92-730

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS;
FREELOVE PETERSON, (WIDOW);
PAUL PETERSON, (DECEDENT),
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

Should the expanded situs responsibilities created by an amendment to 33 U.S.C. § 903(a), which defines the scope of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), be given retroactive effect to impose liability on employers and insurers for employees exposed to toxic substances at work prior to the amendment, who become disabled or die thereafter?

Should this Court clarify or resolve the "tension" between *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 109 S.Ct. 468 (1988) (presumption against retroactivity) and *Bradley* v. *Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006 (1974) (presumption favoring retroactivity) here, where an amendment has been construed to create a new liability retroactively, in the absence of Congressional language requiring this result, and where the legislation was not a remedial response to an erroneous judicial interpretation?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI.

Jurisdictional Statement.

This Petition for a Writ of Certiorari ("Petition") seeks review of a judgment of the United States Court of Appeals for the

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[1] The corporate parent of the Petitioner, Insurance Company of North America, is CIGNA Property & Casualty Companies. The Petitioner has no affiliate subsidiaries. See Supreme Court Rules 14.1(b), 29.1.

Second Circuit ("Second Circuit") entered on July 16, 1992, which denied a petition for review of an order of the United States Department of Labor Benefits Review Board ("Board"), awarding death benefits to the Respondent Freelove Peterson ("Mrs. Peterson"), widow of the Respondent Paul Peterson ("Peterson"), under the LHWCA, 33 U.S.C. §§ 901, *et seq.* The decision of the Board reversed the decision of an Administrative Law Judge denying benefits to the Respondents. A complete copy of the Second Circuit's 15-page majority opinion and 9-page dissenting opinion is appended to this Petition.

Jurisdiction is appropriate under 33 U.S.C. §§ 901, *et seq.* See *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25, 26-27, 86 S.Ct. 153, 154 (1965).

Statutory Provisions at Issue.

This case involves the scope of coverage of § 903(a) of the LHWCA, 33 U.S.C. § 903(a), as amended by Pub. L. No. 92-576, §§ 2(c), 21, 86 Stat. 1251, 1265. Effective November 26, 1972, 33 U.S.C. § 903(a) was amended to add the emphasized language:

> "compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any *adjoining pier, wharf,* dry dock, *terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*). . . ."

33 U.S.C. § 903(a) (parenthetical in original).

The full text of 33 U.S.C. § 903(a), before and after the 1972 amendment, is reproduced in the appendix to this Petition pursuant to Supreme Court Rule 14.1(k).

Statement of the Case.

The Petitioner, Insurance Company of North America ("INA"), seeks review of the Second Circuit's decision upholding an award of death benefits under 33 U.S.C. § 903(a). Liability under this provision is imposed in relation to a situs requirement: an injury is compensable only if it occurred at a location identified in the statute. In 1972, Congress expanded the list of sites of injury triggering liability under the LHWCA. See Pub. L. No. 92-576, §§ 2(c), 21, 86 Stat. 1251, 1265.[2]

At issue is whether the expanded situs responsibilities created by the 1972 amendment apply to employers and their insurers for employees who were exposed to toxic substances at work before the effective date of the amendment, but who became disabled or died after the effective date of the amendment.

The claim in this case arises out of Peterson's employment as a carpenter and a joiner for the General Dynamics Corporation ("General Dynamics") in its Electric Boat Division on the Thames River in Groton, Connecticut between November, 1962 and January, 1967. While there, Peterson worked in the "Model Shop" and "Joiner Shop." Both jobs may have required him to work in submarines on the river, although he would have spent the vast majority of his time in buildings on land. He allegedly inhaled asbestos in the Model and Joiner Shops.

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[2] The maritime employment "status" requirement also added to this definition by the 1972 amendment, see generally *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 300, 103 S.Ct. 634, 637-638 (1983), is not involved.

After leaving General Dynamics in January, 1967, Peterson worked elsewhere where he also may have been exposed to asbestos. On November 3, 1984, he encountered breathing problems and was hospitalized. He was diagnosed as having metastatic lung cancer and died less than one month later at the age of 76.

In late 1985, Mrs. Peterson was advised that her husband's death may have resulted from his asbestos exposure twenty years earlier while at General Dynamics. She filed a claim for disability benefits on behalf of her husband and a claim for death benefits as his surviving widow. See 33 U.S.C. § 912. INA, General Dynamic's insurer, denied benefits at an informal conference, 33 U.S.C. § 919(a); 20 C.F.R. § 702.311, and the case was assigned to an Administrative Law Judge ("ALJ") with the United States Department of Labor (Dolan, J.). See 33 U.S.C. § 919(a)(c)(d); 20 C.F.R. § 702.317(c).

After a hearing, the ALJ concluded that Mrs. Peterson's rights were governed by LHWCA law in effect at the time her husband was last conceivably exposed to asbestos at General Dynamics, his final day of employment in 1967. In order to be compensated under the LHWCA as then in effect, Peterson's injury had to have occurred "upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. § 903(a) (superseded). See also *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 215-216, 90 S.Ct. 347, 349-350 (1969) (distinguishing between "land-based injuries" and "navigable water injuries" for purposes of LHWCA recovery); *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 208, 92 S.Ct. 418, 423 (1971) (same). The ALJ ruled that Peterson's exposure to asbestos had occurred in land-based buildings adjoining the Thames River, not upon the river itself or a dry dock. Thus, under the situs standards in effect in 1967, Peterson's injury was not compensable under the Act.

Mrs. Peterson appealed to the Board. See 33 U.S.C. § 921(b)(3). The Board reversed the ALJ, ruling that LHWCA law in effect on the date of manifestation of Peterson's disease in 1984 should have governed the eligibility for benefits. The Board found that Peterson was injured at a situs within 33 U.S.C. § 903(a), as redefined by the 1972 amendment. As a result, the Board awarded death benefits and remanded the matter to the ALJ for a calculation of disability benefits, which were subsequently resolved by a partial settlement.

INA and the Director of the United States Department of Labor's Office of Workers' Compensation Programs ("Director") appealed the Board's decision regarding death benefits to the Second Circuit under 33 U.S.C. § 921(c).[3] After briefing and oral argument, a majority of the three-judge panel (Miner and McLaughlin, JJ.) denied INA's petition for review on July 16, 1992. The majority ruled that, in cases allegedly involving a disease with a long latency period, eligibility for benefits under the LHWCA should be determined by reference to the statutory definition of "injury" in effect as of the date the disease became manifest, rather than the date of last conceivable exposure at the work place. The majority thus applied the definition of injury contained in 33 U.S.C. § 903(a) in effect in 1984, when Peterson's metastatic lung cancer became manifest, rather than the definition in effect on January 6, 1967, Peterson's last day of employment.

The Hon. John S. Martin, a District Court Judge from the Southern District of New York, sitting by designation, wrote a

[3] The Director agreed with INA's position that the Board's manifestation analysis constituted an impermissible retroactive application of 33 U.S.C. § 903(a), as amended in 1972, because it improperly expanded the class of individuals entitled to recover for exposures occurring prior to the amendment's effective date. The Director, however, argued that the Board's award of benefits could be upheld on an alternative basis: the purported sufficiency of the evidence that Peterson had been exposed to asbestos at a site within the pre-1972 definition of eligibility. The Director's alternative argument, however, contradicted the ALJ's express findings on this issue.

9-page dissenting opinion. Judge Martin criticized the majority for imposing liability retroactively, creating a legal liability for General Dynamics which had not existed during Peterson's employment, and producing "manifest injustice" in violation of *Bradley* v. *Richmond School Board*, 416 U.S. at 718, 94 S.Ct. at 2019.

INA has timely filed this Petition to obtain review of the Second Circuit's decision. See Supreme Court Rule 13.1.

Argument.

I. By Adopting a Manifestation Trigger for Coverage under 33 U.S.C. § 903(a), the Second Circuit Impermissibly Imposed a Retroactive Legal Liability upon INA.

The Second Circuit majority opinion ("majority opinion") recognized that

> "at the time of Peterson's *exposure* to asbestos (1962-67), the LHWCA did not provide benefits for any disability or death resulting strictly from an injury, i.e., exposure to asbestos, occurring in either the Model or Joiner Shops, because the Shops were in buildings located on land."

See majority opinion, p. 8 (emphasis and parenthetical in original).

The majority opinion also recognized that "[i]f this injury happened on the date of last exposure, the pre-1972 Act situs requirement must be met." *Id.*, p. 9. According to the majority opinion, however, the pre-1972 situs requirements could be circumvented because Peterson's "injury" under 33 U.S.C. § 903(a) was deemed to have occurred on the date his cancer

became manifest in 1984, not in 1967, when he was last conceivably exposed to asbestos at work.

As the dissenting opinion correctly perceived, a necessary result of this decision is that it has imposed upon General Dynamics and its insurer INA a legal liability that had not existed to any degree during Peterson's employment. This retroactive creation of an entirely new liability violates canons of statutory construction.

In *Bowen* v. *Georgetown University Hosp.*, 488 U.S. at 208, 109 S.Ct. at 471, a unanimous decision, this Court stated that "retroactivity is not favored in the law." As a result, the Court ruled that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*, 488 U.S. at 208, 109 S.Ct. at 471, and cases cited.

In this case, there is nothing in the language or legislative history of 33 U.S.C. § 903(a) which indicates that Congress intended to give this statute retroactive effect, much less requires this result. See *Bowen*, 488 U.S. at 208, 109 S.Ct. at 471. To the contrary, where Congress intended to confer retroactive application on certain of the 1972 LHWCA amendments, it did so expressly either at the time of enactment or subsequent legislation in 1984. See, e.g., Pub. L. 98-426, § 10(a)(2), adding subsection (i) to 33 U.S.C. § 910 (governing average weekly wage computations); Pub. L. 98-426, § 11(a), amending 33 U.S.C. § 912 (statute of limitations for bringing claim); Pub. L. 98-426, § 12, adding subsection (2) to 33 U.S.C. § 913(b) (same). Congress did not confer retroactive application on 33 U.S.C. § 903(a) at the time of its amendment in 1972,[4]

[4] Generally, the 1972 amendments to the LHWCA did not contain any language specifying how they were to apply. They merely became "effective" on a specified date. Pub. L. No. 92-576, § 22, 86 Stat. 1265. Only § 20(c)(3) of this legislation, which eliminated the distinction between widows and widowers of employees, provided that "the amendment made by this subsection shall apply only with respect to deaths or injuries occurring after [its] enactment." 86 Stat. 1265.

in 1984,[5] or at any other time. Under *Bowen*, the Second Circuit should have construed this statute as applying only prospectively in view of Congress' failure to state expressly a contrary purpose.

This same result follows under the 3-part test in *Bradley* v. *Richmond School Board*, 416 U.S. at 718, 94 S.Ct. at 2019.[6]

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[5] Section 903(a) defines the scope of the LHWCA's coverage. It is thus a major provision in the Act. It is unlikely that Congress simply overlooked it in 1984 when it amended other provisions of the LHWCA, see Pub. L. 98-426, to create retroactive effect. Under principles of statutory construction, this Court could permissibly construe Congress' failure to amend 33 U.S.C. § 903(a) in 1984 as a substantive omission and as indicating an affirmative intent that § 903(a) apply prospectively only. See generally *King* v. *St. Vincent's Hosp.*, U.S. 112 S.Ct. 570, 574 (1991) (statutory interpretation dependent upon context); *Immigration and Naturalization Service* v. *Hector*, 479 U.S. 85, 91 n.6, 107 S.Ct. 379, 382 n.6 (1986) (construing effect of four separate amendments to term in statute).

[6] This Court has recognized a historic "tension" in its retroactivity analysis. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 1577 (1990).

Under the *Bowen* line of cases, "[r]etroactivity is not favored" and is presumed *not* to apply unless legislative language requires otherwise. See *Bowen*, 488 U.S. at 208, 109 S.Ct. at 471. See also *Greene* v. *United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621-622 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164, 65 S.Ct. 172, 185 (1944); *Miller* v. *United States*, 294 U.S. 435, 439, 55 S.Ct. 440, 441-442 (1935); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163, 48 S.Ct. 236, 237 (1928).

Under the *Bradley* line of cases, however, retroactivity is presumed "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." See *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016. See also *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 526 (1969); *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, 2 L.Ed. 49 (1801).

The inconsistency created by these two approaches to retroactivity analysis has created substantial uncertainty. See *Kaiser Aluminum*, 110 S.Ct. at 1579 (Scalia, J., concurring) ("[T]hese two lines of cases are not merely, as the Court confesses, in 'apparent tension' *ante*, at 1577; they are in irreconcilable contradiction, and have spawned Courts of Appeals opinions to match."), and cases cited. See also, e.g., post-*Kaiser Aluminum* cases of *Ayala-Chavez* v. *United States Immigration and Naturalization Service*, 945 F.2d 288, 295 n.9 (9th Cir. 1991) ("apparent conflict between two lines of Supreme Court cases regarding the existence of a presumption for or against retroactivity of legislation."); *National Wildlife Federation* v. *Agricultural Stabilization and Conservation Service*, 941 F.2d 667, 671 (8th Cir. 1991) ("[T]he Supreme Court's cases have not been clear when we must apply a new law. . . ."); *Simmons* v. *Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991)

The majority erred by ignoring this test. The dissenting opinion, however, utilized the 3-part *Bradley* test and correctly concluded that retroactively applying 33 U.S.C. § 903(a) resulted in "manifest injustice."

The first factor in *Bradley* distinguishes between litigation involving private parties only and litigation involving a public entity. *Bradley*, 416 U.S. at 718-719, 94 S.Ct. at 2019-2020. This case involves private parties only. Mrs. Peterson is not acting in a role of a "private attorney general." See *id.*, 416 U.S. at 718-719, 94 S.Ct. at 2019-2020. She is pursuing private litigation under the LHWCA for her own benefit. Thus, this factor favors applying the statute prospectively only.

The second factor is whether retroactive application of the statute "would infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720, 94 S.Ct. at 2020-2021. Here, Mrs. Peterson has asserted a cause of action which was non-existent prior to the 1972 amendment to 33 U.S.C. § 903(a). Undisputedly, if her decedent had contracted cancer before 1972 as a result of his

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(discussing "the irreconcilable conflict in the Court's directions on this point," and need for "seizing the opportunity to resolve the real and troubling tension between the *Bradley* and [*Bowen* v.] *Georgetown Hospital* lines of precedent"); *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 110-111 (7th Cir. 1990) (characterizing judicial precedent on retroactivity issues as "decidedly mixed").

This inconsistency also risks arbitrariness: retroactivity issues frequently turn on which of the two threshold presumptions the Courts of Appeals choose to adopt. Compare *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991) (following *Bowen* presumption against retroactivity); *Leland* v. *Federal Insurance Administrator*, 934 F.2d 524, 527 (4th Cir.), *cert. denied*, U.S. 112 S.Ct. 417 (1991) (same); *Sargisson* v. *United States*, 913 F.2d 918, 923 (Fed. Cir. 1990) (same) with *Federal Deposit Insurance Corp.* v. *New Hampshire Insurance Co.*, 953 F.2d 478, 486 (9th Cir. 1991) (following *Bradley* presumption favoring retroactivity); *United States* v. *Peppertree Apartments*, 942 F.2d 1555, 1560-1561 (11th Cir. 1991) (same); *Federal Deposit Insurance Corp.* v. *Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991) (same); *Aledo-Garcia* v. *Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 355 (1st Cir. 1989) (same).

This case affords an opportunity for this Court to resolve this tension and to clarify an important principle of statutory construction in the LHWCA and elsewhere.

asbestos exposure in buildings on land, neither he nor Mrs. Peterson would have had a LHWCA claim against General Dynamics. See *Nacirema Operating Co.* v. *Johnson*, 396 U.S. at 215-216, 90 S.Ct. at 349-350 (distinguishing between "land-based injuries" and "navigable water injuries" for purposes of LHWCA recovery); *Victory Carriers, Inc.* v. *Law*, 404 U.S. at 208, 92 S.Ct. at 423 (same). In this context, neither Mrs. Peterson nor her husband had any vested or matured rights under the LHWCA which would have been adversely affected if the 1972 amendments were not applied retroactively. As a result, this second factor favors applying the statute prospectively only.

The final factor in *Bradley* concerns the "possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720, 94 S.Ct. at 2021. In this case, General Dynamics was not liable during the period of Mr. Peterson's employment from 1962 to 1967 for the type of claims asserted in this case. See *Nacirema Operating Co.* v. *Johnson*, 396 U.S. at 215-216, 90 S.Ct. at 349-350; *Victory Carriers, Inc.* v. *Law*, 404 U.S. at 208, 92 S.Ct. at 423. Retroactively expanding the class of claimants under the LHWCA has imposed a new legal liability upon it for past events at a time when it has no opportunity to modify its conduct so as to avoid responsibility or to insure against the additional risks. As a result, the expectations and rights of General Dynamics and INA have been profoundly jeopardized. This factor also favors applying § 903(a) prospectively only.[7] See also discussion, *infra*.

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[7] The 1972 amendments to the LHWCA are not remedial. The rationale that legislation overturning an erroneous judicial interpretation should be given retroactive effect thus has no application. Compare, e.g., *Mrs. W.* v. *Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) (amendments to Education of the Handicapped Act applied retroactively since they codified "congressional purpose . . . which Congress believed the Supreme Court had misinterpreted."); *Lussier* v. *Dugger*, 904 F.2d 661, 665-666 (11th Cir. 1990) (Civil Rights Restoration Act of 1987 given retroactive effect).

Besides neglecting any analysis of the *Bradley* test, the majority opinion was further flawed. It relied heavily, indeed found compelling (see majority opinion, p. 12), inapposite case law which adopted a manifestation trigger to impose retroactive effect on statutes affecting procedures or remedies. In so doing, the majority overlooked the crucial distinction between the modification of a vested or existing liability and the creation of an entirely new one.

The majority placed great reliance on *SAIF Corp./Oregon Ship* v. *Johnson*, 908 F.2d 1434 (9th Cir. 1990).[8] The court in *SAIF Corp.*, in turn, relied on its earlier decision in *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). In *Black*, however, the court had merely held that "the date the disease manifests itself determines the time of injury for purposes of calculating compensation *levels*." *Black*, 717 F.2d at 1293 (emphasis added). *Black* involved the computation of an employee's average weekly wage — after it had already been determined that he was entitled to LHWCA compensation and that his employer was liable for at least some amount of benefits. *Id.* at 1287-1288. Accordingly, *Black*'s context was not "slightly different," as the majority has reasoned, but wholly distinct. Unlike

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[8] *SAIF Corp.* underscores the need to grant review in this case. Allowance of this Petition would reduce the possibility of future error based on the combined precedent created by *SAIF Corp.*, a case in which a Petition for a Writ of Certiorari had not been filed, and this decision. The potential for confusion is illustrated in the Ninth Circuit, where there are at least three disparate decisions regarding the retroactive application of certain LHWCA provisions. See *SAIF Corp./Oregon Ship* v. *Johnson*, 908 F.2d at 1434 (exposure to toxic substance *does not* constitute "injury" for purposes of § 903(a) entitlement); *Bernardo* v. *Director, OWCP*, 772 F.2d 576 (9th Cir. 1985) (exposure to toxic substance *does* constitute "injury" for purposes of § 921(c) venue); *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280 (9th Cir.), *cert. denied*, 466 U.S. 937 (1983) (exposure to toxic substance *does not* constitute "injury" for purposes of § 910 computation of average weekly wage). The need for clarification from this Court is magnified by the growth of litigation involving occupational diseases with long latency periods and by the fact that the particular provision involved here, 33 U.S.C. § 903(a), is the major section defining the scope of the LHWCA.

this case, *Black* involved an existing, vested liability, not an entirely new liability.

In 1984, moreover, Congress subsequently amended the LHWCA provision interpreted in *Black* and, in effect, codified its result. See Pub. L. 98-426, § 10(a)(2), adding subsection (i) to 33 U.S.C. § 910 (governing average weekly wage computations). Congress, however, did not amend the provision involved here, 33 U.S.C. § 903(a), at the time it amended § 910 and other provisions of the LHWCA. See also 33 U.S.C. §§ 921, 913(b). Congress' failure to amend § 903(a) may be construed as expressing a substantive intent that this provision apply prospectively only. See also discussion, *supra*.

Further, the stated rationales in *Black* are inapplicable in this case. The LHWCA's "paramount goal" of compensating workers for lost earning capacity stemming from occupational diseases, see majority opinion at p. 11 and *Black*, 717 F.2d at 1289, is inapposite because "Peterson worked for almost eighteen years after the last date he possibly could have been exposed." See majority opinion, p. 13. The rationale that persons do not consider themselves "injured" at the time of exposure, see majority opinion at p. 11 and *Black, supra* at 1289-1290, is dubious and is not an appropriate subject for either judicial notice or observation. This observation is not indisputedly true and appears outdated in view of the ability to obtain a recovery for prospective harm in toxic tort litigation generally, so long as the plaintiffs in such cases can establish their likelihood of contracting disease in the future. See, e.g., *Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 411-412 (5th Cir. 1986) (former shipyard worker entitled to recover for reasonable probability of developing cancer in future based upon prior exposure to asbestos); *Restatement (Second) of Torts* § 910, comment a (1978) (risk of future harm presently compensable as long as "proof of the probable extent satisfies the rules as to certainty"). The further rationale in *Black* that a "last exposure rule" would unjustifiably burden workers with

the risk of unanticipated illness, see majority opinion at p. 11 and *Black, supra* at 1292, is one-sided and contradicts this Court's statement in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 726, 100 S.Ct. 2432, 2439 (1980), that ". . . whether jurisdiction barriers are erected on land or at the water's edge; 'The horns of the jurisdictional dilemma press as sharply on employers as on employees,' " *id.*, quoting *Davis* v. *Department of Labor*, 317 U.S. 249, 255, 63 S.Ct. 225, 228 (1942).

As with *Black*, essentially all other cases cited by the majority adopting a manifestation rule involved either an existing, vested liability or implicated merely a procedure or a remedy. None of these cases created an entirely new liability, and reliance upon them was misplaced.[9]

Where a cause of action is tolled by the discovery rule or where benefits levels are retroactively altered, the status of a defendant has *not* been transformed from freedom from fault to liability. Where the statute of limitations is tolled by the discovery rule, under the LHWCA or otherwise, the defendant's liability is nonetheless measured by reference to the governing law *at the time the conduct occurred*. See *Urie* v.

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[9] For example, neither *Castorina* v. *Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985) nor *Newport News Shipbuilding and Dry Dock Co.* v. *Harris*, 934 F.2d 548, 551-552 (4th Cir. 1990) applied a manifestation rule "to comparable aspects of the LHWCA." See majority opinion, pp. 11-12. In *Castorina*, the court employed a manifestation analysis pursuant to 33 U.S.C. § 905(b) to impose a diminished, not heightened, standard of civil liability upon the defendant. *Castorina*, 758 F.2d at 1031. In *Newport News*, the court's analysis was confined to determining whether an employer was entitled to relief from a second injury fund, 33 U.S.C. § 908(f). The court applied the definition of "injury" under § 910(i), a provision expressly made retroactive by the 1984 amendments. *Newport News*, 934 F.2d at 553. See Pub. L. 98-426, § 10(a)(2), adding subsection (i) to 33 U.S.C. § 910 (governing average weekly wage computations).

Similarly, the statute of limitations cases, see majority opinion, pp. 12-13, and the death benefit cases, see *id.*, pp. 14-15, are also readily distinguishable. All involve procedures or remedies, not a new substantive liability.

Thompson, 337 U.S. 163, 180, 69 S.Ct. 1018, 1029 (1949) (although statute of limitations under Federal Employers' Liability Act for silicosis was tolled by discovery rule, question of railroad's liability determined by reference to its conduct as of time of exposure). It is unreasonable and unfair to impose liability retroactively, as in this case, where a party

> "no longer has the opportunity to modify its conduct so as to avoid liability or to make a reasoned choice among alternative courses of action in light of the economic consequences that might be reasonably anticipated."

See dissenting opinion, p. 4.[10]

These principles were well expressed in *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905, 101 S.Ct. 281 (1980), where the court decided whether to apply the 1972 amendments to § 914(m) of the LHWCA retroactively:

> "Where Congress fails to make its intentions absolutely clear, courts are much more inclined to apply retroactively amendments directed at the *remedy* rather than changes in *substantive* rights. Retroactive

[10] The concerns expressed in the dissenting opinion may have drastic impact on smaller businesses in the maritime industry who are in a less fortuitous position than the employer in this case. Here General Dynamics was covered by LHWCA insurance because at least part of its pre-1972 business operations were conducted on navigable waters, and it was thus able to anticipate some exposure to such claims, albeit not of the type involved here. Many maritime businesses such as marine terminal operators, however, have conducted only shoreside employment, outside the scope of the Act's pre-1972 law. These employers were not required to "secure the payment to [their] employees of the compensation payable under" the Act, see 33 U.S.C. § 904(a), and likely did not carry LHWCA insurance before 1972. If such employers are now held responsible for post-1972 claims based on pre-1972 employment, those liabilities will be uninsured. Given the long latency periods of many diseases associated with toxic substance exposures, the financial impact of death claims like the present could cripple many small businesses.

> modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability. Persons and employers must be able to base their conduct on what they believe the law to be. Retroactive creation of legal responsibilities or abolition of legal rights risks unfairness because the retroactive change confounds the expectations upon which persons acted.
>
> "Retroactive modifications in remedy, on the other hand, often do not involve the same degree of unfairness. Such modifications do not transform a legal act into an illegal act, or render one responsible to safeguard someone previously thought to act at his peril. Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."

Id. at 93 (citation omitted, emphasis in original). In *Hastings*, the court recognized that those 1972 amendments to the LHWCA which "extended the Act's protection to certain workers engaged in maritime employment who were not previously covered . . . change[d] principles of substantive law . . . [and] affect[ed] the rights and liabilities of persons and businesses in the maritime industry." *Id.* at 93.

The Second Circuit overlooked these fundamental principles and ruled instead that "there can be no justification for applying the law in effect at the moment of last exposure. . . ." See majority opinion, p. 13. By adopting a manifestation trigger for coverage under § 903(a), the court created a legal liability for General Dynamics that did not exist at the time of Peterson's employment. The precedent created by this interpretation of § 903(a), an integral provision defining the scope of the LHWCA, warrants allowance of this Petition.

Conclusion.

For the foregoing reasons, this Court should grant this Petition, vacate the decision below, and remand this case to the Second Circuit for further review consistent with the standards this Court sets forth in reconciling *Bowen* v. *Georgetown University Hosp.*, 488 U.S. at 208, 109 S.Ct. at 471 and *Bradley* v. *Richmond School Board*, 416 U.S. at 718, 94 S.Ct. at 2019.

Respectfully submitted,

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October, 1992

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Appendix.

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

ELAINE B. GOLDSMITH
Clerk

DATE: July 16, 1992
Re: *Insurance Company* v. *LABR*
Docket No.(s): 91-4193

Dear Counsel: [EDIT 1 OF 2]

The court has handed down a decision in the above-entitled case. The decision of the district court has been

PETITION FOR REVIEW DENIED

A copy of the printed opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with Section 0.17 (7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) of the Federal Rules of Appellate Procedure requiring the itemized and verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

ELAINE B. GOLDSMITH, Clerk
By:
Angela Martin
Deputy Clerk

U. S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

OFFICE OF WORKERS' COMPENSATION PROGRAMS
Division of Workers' Compensation Programs

November 27, 1989

	File No: 1-88208
	Re: Paul Peterson
PAUL PETERSON	Injured: D.O.D. 12/1/84
	Employer: General Dynamics/Ct.
VS	Carrier: INA
	Carrier No:
GENERAL DYNAMICS CORP.	OALJ No: 88-LHC-3153
AND	
INSURANCE CO. OF NORTH AMERICA	

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within 10 days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, Suite 757, 1111 - 20th Street, N.W., Washington, D.C. 20036.

Sincerely,

FRANCIS R. MAHONEY
Deputy Commissioner

SP:rt

Enclosure

Longshoremen's and Harbor Workers' Compensation Act, as extended

A petition for reconsideration of a decision and order must be filed with the Office of Administrative Law Judges, U. S. Department of Labor, Washington, D. C. 20210, within 10 days from the date the Deputy Commissioner files the decision and order in his/her Office.

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D. C., within 30 days from the date upon which a decision and order has been filed in the Office of the Deputy Commissioner, or within 30 days from the date final action is taken on a timely filed petition for reconsideration. If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal or protective appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30-day period described above, whichever period last expires. A copy shall be served upon the Deputy Commissioner and on all other parties by the party who files a notice of appeal. Proof of service shall be included with the notice of appeal.

The date compensation is due is the date the Deputy Commissioner files the decision and order in his/her Office.

CERTIFICATE OF FILING AND SERVICE

I certify that on November 27, 1989, the foregoing Compensation Order was filed in the Office of the Deputy Commissioner LHWC and a copy thereof was mailed on said date by CERTIFIED mail to the parties and their representatives at the last known address of each as follows:

Mrs. Freelove Peterson, 117 Ten Rod Road, North Kingstown, R.I. 02852 Claimant

General Dynamics Corp., Eastern Point Road, Groton, Ct. 06340

Insurance Co. of North America, P.O. Box 5001, Hartford, Ct. 06102 Insurance Carrier or Employer (if self-insured)

Matthew Shafner, Esq., P.O. Drawer 929, Groton, Ct. 06340
Scott Richardson, Esq., c/o Parker, Coulter, Daley & White, 1 Beacon Street, Boston, MA 02108

A copy was also mailed by regular mail to the following:

Judge MARTIN J. DOLAN, JR. Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite NB-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs (LHWCA) U.S. Department of Labor, Washington, D.C. 20211

FRANCIS R. MAHONEY
Deputy Commissioner LHWC

FIRST Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

Department of Labor

Nov 24 1989

In the Matter of:

Paul Peterson
Claimant

against

General Dynamics Corporation
Employer

and

Insurance Co. of N. America
Carrier

Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts 02109

Case No. 88-LHC-3153

OWCP No. 1-88208

Appearances:

Matthew Shafner, Esq.
O'Brien, Shafner, Bartinik, Stuart & Kelly, P.C.
P.O. Drawer 929
Groton, CT 06340
For the Claimant

Scott Richardson, Esq.
Parker, Coulter, Daley & White
One Beacon Street
Boston, MA 02108
For the Employer/Carrier

Before: MARTIN J. DOLAN, JR.
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

Statement of the Claim

This is a claim for Workers' Compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33

U.S.C. 901, *et. seq.*, (herein referred to as the Act) filed on behalf of Paul Peterson (herein referred to as the Decedent), by his widow, Freelove Peterson (herein referred to as the Claimant), against the Employer, General Dynamics Corporation (herein referred to as the Respondent), and Insurance Company of North America.

This matter was called for a formal hearing on January 14, 1989 in New London, Connecticut, at which time the parties were represented by counsel and afforded full opportunity to present documentary evidence, examine and cross-examine witnesses and to make oral arguments at that time. Documentary evidence was submitted by the Claimant on a post-hearing basis in the form of a deposition of Dr. David G. Kerns, dated March 2, 1989; this is admitted into evidence as Claimant's exhibit 12. The Employer/Carrier submitted on a post-hearing basis a deposition of Dr. Thomas Godar dated February 23, 1989; employment records of the decedent; and a letter dated February 7, 1989 from the Office of Workers' Compensation Program advised to counsel for the employer; these documents are admitted into evidence as employer's exhibit 9, 10 and 11. This Decision and Order is rendered based upon an evaluation of the entire evidentiary record.

At the onset of the hearing, the parties agreed that an employer/employee relationship existed at all relevant times. The parties also agree that the National Average Weekly Wage for the period in question was $289.83. The Claimant is seeking an award of permanent total disability pursuant to section 8(a) of the Act for the period from November 3, 1984 to December 1, 1984, (the date of decedents' death) as well as widow's benefits thereafter. The Claimant contends that her deceased husband developed lung cancer as a result of his exposure to asbestos while employed at General Dynamics. The Employer's position is that the Decedent's injury is not causally related to his employment at General Dynamics.

The issues presented for resolution are: whether there is jurisdiction under the Act; whether there was timely notice of injury and filing of the claim; whether there was a causal connection between the injury and the employment.

Findings of Fact and Conclusions of Law

Paul Peterson, hereinafter referred to as the Decedent, was born on January 3, 1908. The Decedent married Freelove Peterson, the Claimant, on January 1, 1938 and they remained married up until the time of his death. The Claimant has not remarried since that time and there are no dependent children. The Decedent died on December 1, 1984.

The Decedent was employed by the General Dynamics Corporation, Electric Boat Division for approximately four years between November 13, 1962 and January 6, 1967. The Decedent worked under the classification of "Joiner 2/C" between November 13, 1962 and April 9, 1966; under the classification "Carpenter 2/C" between April 10, 1966 and June 25, 1966; and again under the classification "Joiner 2/C" between June 26, 1966 and January 6, 1967. During the course of his employment, the decedent worked in both the Model Shop and the Joiner Shop. In the Model Shop, the Decedent's duties included building scale models of components used in submarine construction. In the Joiner Shop, the Decedent assisted in building battery wedges for the submarines.

A witness for the Claimant, Mr. Donald Beeney, testified at the hearing that he worked in the model-joiner department during the 1962-1967 period during which decedent worked in that department and testified that he went aboard the submarines under construction once or twice a year. The submarines at that time where situated in wet dock over the Thames River, navigable water of the United States. The witness stated that the employees of the Model Shop would go aboard the sub-

marine to take measurements of the ship's components. However, the witness testified that he had no specific recollection of seeing the Decedent, Paul Peterson go aboard the submarines during the course of his employment at Electric Boat.

Another witness for the Claimant, Theodore Perkins, testified that he worked as a joiner and model joiner in the 1960's, but that he did not know the decedent, could not recall him inasmuch as here were several hundred workers in the model department during the 1960's and could furnish no relevant evidence as to whether decedent ever went aboard submarines and whether decedent was exposed to asbestos while aboard submarines under construction.

Subsequent to his leaving his employment with the General Dynamics Corporation in January 1967, the Decedent worked as the captain of a charter pleasure boat. Approximately seventeen (17) years later the Decedent was admitted to South County Hospital in Rhode Island on November 3, 1984 because he was suffering from increasing shortness of breath. Tests performed at the hospital at that time revealed that the Decedent had a malignant tumor in his lung later diagnosed as adenocarcinoma. Mr. Peterson died at the age of 76 on December 1, 1984. No autopsy was performed. The death certificate listed metastatic lung cancer and chronic obstructive lung disease as the immediate cause of death.

In connection with a determination as to whether the requirements of Section 12 and 13 were met in connection with the filing of a claim for compensation on behalf of Mr. Peterson, record evidence reveals that a claim for compensation (LS-203) dated February 24, 1986 was filed with the Office of Workers' Compensation Programs on February 24, 1986, some four months subsequent to the Claimant's receipt of Dr. Capalbo's letter of October 28, 1985 (Claimant Exhibit 3). The Claimant here, widow of decedent, did not become aware of the potential relationship between decedent's lung cancer and possible as-

bestos exposure at General Dynamics until she received Dr. Capalbo's letter. The employer thus had timely notice of decedent's injury less than one year after the Claimant became aware of the possible relationship between Mr. Peterson's death and possible asbestos exposure during his employment of General Dynamics. It is clear that the claim was timely filed within the two year period subsequent to the Claimant's date of awareness. At the time of decedent's death on December 1, 1984, there were no medical reports on physicians' diagnoses which in any manner raised the possibility of a work related cause of decedent's death. I further find that the claim of the widow for death benefits pursuant to Section 9 of the Act was timely on the grounds that a cover letter dated February 21, 1986 addressed to the Office of Workers' Compensation Programs which accompanied the filing of the claim for compensation (LS-203) filed February 24, 1986 (CX 4) made reference therein to the fact that Mr. Peterson was deceased and thus this notice apprised the employer that Claimant was filing for benefits under the Longshore Act on the allegation that he had sustained a work-related injury and was deceased. A separate widow's claim for Death Benefits (Form LS-262) was filed on October 21, 1987, within the two year period of time subsequent to Claimant's date of awareness on October 28, 1985 via the receipt of Dr. Capalbo's aforementioned October 28, 1985 letter.

In connection with a determination as to whether or not Claimants death was in any manner attributed to occupational disease resultant from asbestos exposure while decedent was employed by General Dynamics from 1962-1967, there is medical evidence in the way of deposition testimony of Dr. Kerns, who testified in a post-hearing deposition on March 2, 1989 that in his opinion Mr. Peterson had died of metastatic adenocarcinoma that was probably a primary lung cancer. Dr. Kerns' review of the x-rays taken of the decedent upon his admission to the hospital in 1984 showed evidence of bilateral pleural

thickening of very minimal width and extent. Dr. Kerns' opinion was that this thickening was suggestive of asbestos exposure. Additionally, Dr. Kerns noted that the Decedent's medical records revealed that he had a forty year history of cigarette smoking, but that he had stopped smoking ten years previous to his death at the age of 76 in 1984. Dr. Kerns stated that if Claimant in fact had asbestos exposure while working at General Dynamics from 1962-1967, that such asbestos exposure would have contributed along with cigarettes to the development of a presumed metastatic adenocarcinoma of the lung.

On the other hand, Dr. Thomas J. Godar testified in a post-hearing deposition on February 23, 1989. Dr. Godar stated that he had reviewed the Decedent's medical records and was of the opinion that markings in the lung field revealed by x-rays of the Decedent taken in 1984 were not consistent with asbestos exposure, but rather were characteristic of metastatic adenocarcinoma. Based upon his review of the 1984 x-rays, Dr. Godar stated that cigarette smoking was the prominent and most likely cause of the Decedent's tumor.

Dr. Capalbo in a October 28, 1985 letter to Richard Carpenter, the decedent's son-in-law, who had earlier inquired of Dr. Capalbo of any relationship between decedents lung cancer and possible asbestos exposure, opined that classical tumor which is seen with asbestos related problems is called a mesothelioma. Dr. Capalbo further stated as follows:

> The cell block from Mr. Peterson showed a suggestion of adenocarcinoma. I think that based upon this, it is very difficult to absolutely strongly suggest that the relationship of the cancer was from the asbestos. I think that there certainly is reason to believe that the combination of the asbestos exposure and the smoking history resulted in the tumor. Again, I

> do not think that this can be absolutely proven, but I think the exposure itself raises the possibility, and reasonably so, that the combination of things more likely was what caused this.
>
> I will be happy to write a letter to this extent if you feel that this is worth pursuing, but I have no further proof of the tumor besides the cell block and it is not the classical form of tumor related to asbestosis. It is my opinion, however, that it is worth pursuing."

Coverage under the Act is determined with reference to the law in effect at the time of the event which caused the injury, regardless of when the full effect of the injury becomes manifest. Inasmuch as the Decedent's employment and alleged injury at Electric Boat occurred during the period 1962-67, the Act prior to the 1972 amendment controls. The statute in force at that time provided that "compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . 33 U.S.C. 903(a). The Benefits Review Board has consistently held that the Section 20(a) presumption that a claim comes within the provisions of the Act is inapplicable to the threshold issue of jurisdiction. *Sedmark* v. *Perini North River Associates*, 9 BRBS 378 (1978), *aff'd sub nom. Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *rev'd on other grounds*, 444 U.S. 1028 (1980). I find that there is no direct evidence that the decedent went aboard the submarines and was exposed to asbestos aboard submarines during the course of his employment at the Electric Boat Division of the General Dynamics Corporation. Thus, there was no exposure to asbestos on a *situs* covered by the pre-1972 Act and consequently there was no injury sustained by the decedent occurring upon the navigable waters of the United States as required by the pre-1972 act. Claimant has failed to establish jurisdiction under the Longshore and Harbor Workers' Compensation Act.

Notwithstanding my finding of no jurisdiction in this case matter, I nevertheless address the merits of the issue of causality

between decedents death and his prior employment at General Dynamics Corporation. In arriving at a decision in this matter, the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks* v. *Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards* v. *Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hughes* v. *Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Seaman* v. *Jacksonville Shipyard, Inc.*, 14 BRBS 148.9 (1981); *Brandt* v. *Avondale Shipyards, Inc.*, 8 BRBS 698 (1978); *Sargent* v. *Matson Terminal, Inc.*, 8 BRBS 564 (1978). At the outset it further must be recognized that al factual doubts must be resolved in favor of the Claimant. *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co.* v. *Shea*, 406 F.2d 521 (5th Cir. 1969), *cert. denied*, 395 U.S. 921 (1970). Furthermore, it consistently has been stated that the Act must be construed liberally in favor of the Claimant. *Voris* v. *Eikel*, 346 U.S. 328 (1953); *J.V. Vozzolo, Inc.* v. *Britton*, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. *Durrah* v. *WMATA*, 760 F.2d 320 (D.C. Cir. 1985); *Champion* v. *S & M Traylor Brothers*, 690 F.2d 285 (D.C. Cir. 1982). *Harrison* v. *Potomac Electric Power Company*, 8 BRBS 313 (1978).

Once an injury has been shown, there is a presumption that the injury arose out of and in the course of the Employee's employment. *See* Section 20(a) of the Act and *Swinton* v. *J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir.), *cert. denied*, 494 U.S. 820 (1976). The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Indus-*

tries/Federal Sheet Metal, Inc. v. *Director, OPWCP*, 455 U.S. 608 (1982), *rev'g Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d (455 D.C. Cir. 1980). In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and Claimant becomes aware of the relationship between the employment, the disease, and the death or disability. *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

After careful examination of the testimony and evidence, I find and conclude that there is no substantial medical evidence of a relationship between the decedent's employment from 1962 to 1967 and his lung cancer diagnosed in November 1984, seventeen years later in December 1984. It is clear that the Decedent suffered from a metastatic adenocarcinoma of the lung, but there is no reference on the death certificate to mesothelioma, a lung cancer usually attributable to asbestos exposure. Dr. Godar's deposition testimony stated that he found no evidence of asbestos exposure in the Decedent's x-rays and that the course of Mr. Peterson's death was adenocarcinoma of the lung precipitated by many years of cigarette smoking. Further, Dr. Capalbo opined that the tumor in decedents' lung was not the classical form of tumor related to asbestosis. I accept the testimony and findings of these two physicians; I reject the findings of Dr. Kerns as being faulty because his findings of asbestos etiology was premised on an assumption that Claimant had substantial exposure to asbestos during the four year period that decedent worked for the employer. The record is devoid of any direct probative evidence of decedent's exposure to asbestos.

I therefore further determine that the Claimant has failed to show that Decedent sustained an injury causally related to his employment at Electric Boat. I find on the basis of the medical evidence that Decedent died of adenocarcinoma of the lung a condition or cause unrelated to Decedent's work at General Dynamics. The Employer is not liable for compensation for widows survivor benefits under the Act.

ORDER

It is therefore ORDERED that the claim for benefits is hereby DENIED.

MARTIN J. DOLAN, JR.
Administrative Law Judge

Dated: NOV 15 1989
Boston, Massachusetts
MJD:dr

U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

FREELOVE PETERSON
(Widow of PAUL PETERSON
Claimant-Petitioner

v.

GENERAL DYNAMICS CORPORATION
and
INSURANCE COMPANY OF NORTH AMERICA
Employer/Carrier-Respondents

DATE ISSUED: SEP 30 1991

DECISION AND ORDER *EN BANC*

Appeal of the Decision and Order of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Cynthia Fausold Schwanz and Matthew Shafner (O'Brien, Shafner, Bartinik, Stuart & Kelly, P.C), Groton, Connecticut, for claimant.

Scott E. Richardson (Parker, Coulter, Daley & White), Boston, Massachusetts, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, BROWN, DOLDER, and McGRANERY, Administrative Appeals Judge.

PER CURIAM:

Claimant, the widow of decedent Paul Peterson, appeals the Decision and Order (88-LHC-3153) of Administrative Law Judge Martin J. Dolan, Jr., denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked at employer's Electric Boat Division in Groton, Connecticut from November 13, 1962 until January 6, 1967 in both the model and joiner shops. In the model shop, his duties included building scale models of components used in submarine construction. Model shop workers were also required at times to cut pallets of asbestos with table saws. In the joiner shop, decedent assisted in building battery wedges for the submarines. Subsequent to leaving employer, he worked as a captain on a charter boat.

On November 3, 1984, decedent was admitted into South County Hospital in Rhode Island due to shortness of breath. Tests revealed that he had a malignant tumor in his lung, and on December 1, 1984, Mr. Peterson died. His death certificate indicated his immediate cause of death as metastatic lung cancer, due to or as a consequence of chronic obstructive lung disease.[1] On behalf of decedent, a claim was filed on February 20, 1987 seeking permanent total disability benefits under the Act from November 3, 1984 to December 1, 1984, and a separate widow's claim was filed on October 21, 1987.

The administrative law judge first found that the requirements of Sections 12 and 13 of the Act, 33 U.S.C. §§ 912, 913, were met since the first claim and accompanying cover letter were filed four months after Dr. Capalbo's letter of October 28, 1985, in which the physician stated that there was reason to believe that the combination of asbestos exposure and smoking resulted in decedent's tumor. The administrative law judge further found that since decedent's "employment and alleged injury" occurred during the years 1962 to 1967, the jurisdictional provisions of the Act as it existed prior to 1972 applied to this case. The administrative law judge found that claimant failed to establish jurisdiction under Section 3(a) of the pre-1972 Act, 33 U.S.C. § 903(a) (1970),[2] since there

[1] No autopsy was performed.

[2] Prior to 1972, the Act contained only a situs requirement, set forth in § 3(a), 33 U.S.C. § 903(a) (1970) (amended 1972 and 1984), as follows:

was no direct evidence that decedent went on board submarines, and thus, there was no evidence of asbestos exposure upon navigable waters of the United States. This finding notwithstanding, the administrative law judge concluded that there was no substantial medical evidence establishing a relationship between decedent's employment and his lung cancer, and he accordingly found causation was not established. Benefits therefore were denied.

Claimant appeals, contending that the administrative law judge erred in finding that decedent was not covered under the pre-1972 Act. Claimant argues that the uncontradicted testimony of two Electric Boat employees, claimant, and decedent's son-in-law supports a finding that decedent went on board submarines during the course of his employment and was exposed to asbestos. Claimant further asserts that the administrative law judges' finding that lung cancer and death were not related to his employment was also in error. Employer responds, urging affirmance of the denial of benefits.

As a preliminary matter, we first address the issue of whether the jurisdictional provisions of the pre-1972 Act or the Act as amended in 1972 apply to this case. The Board has previously held that coverage under the Act is determined with reference to the law in effect at the time of the event which caused an injury, regardless of when the full effect of the injury becomes manifest. *Paul* v. *General Dynamics Corp.*, 16 BRBS 290 (1984). *See also Gardner* v. *Railco Multi Construction Co.*, 18 BRBS 264 (1986), *remanded*, No. 86-1352 (D.C. Cir.) (*per curiam* Order), *reaff'd in pert. part*, 19 BRBS 238 (1987), *vacated*, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990); *Pryor* v. *James McHugh Construction Co.*, 18 BRBS 273 (1986). Thus, the Board has held that jurisdictional issues in occupational disease cases must be analyzed according to the law in effect at the time of exposure to injurious stimuli. *See Gardner, supra*; *Murphy* v. *Bethlehem Steel Corp.*, 17 BRBS

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon navigable waters of the United States (including any dry dock). . . .

148 (1985); *Wynn* v. *Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 31 (1983); *Verderane* v. *Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981), *vacated on other grounds*, 20 BRBS 62 (1984). The Board stated that these holdings were consistent with the established rule that in occupational disease cases, the responsible employer is the employer during the last employment in which the employee was exposed to injurious stimuli prior to the date of his awareness of the disease. *See Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 37 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

However, in *SAIF Corp./Oregon Ship* v. *Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990), the United States Court of Appeals for the Ninth Circuit held that the law pertaining to the Act's coverage which is to be applied is that which is in effect at the time of injury, which in an occupational disease case occurs at the time the disease becomes manifest. In reaching this conclusion, the court cited extensively from its decision in *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), in which it held in an occupational disease case that the claimant's time of injury for purposes of computing his average weekly wage should be the time the disease manifests itself through a loss of earning capacity. In so holding, the court explicitly rejected a definition of "injury" for this purpose based on the date of exposure to injurious stimuli. The manifestation rule subsequently was codified at 33 U.S.C. § 910(i) (Supp. V 1987).

In extending this analysis to the coverage provisions in *SAIF Corp.*, the Ninth Circuit explained that there were three factors it found persuasive in *Black*. First, the manifestation rule best comports with the paramount goal of the Act, which is to compensate workers for the loss of wage-earning capacity resulting from occupational diseases, because the last-exposure approach would compensate a claimant based on his weekly

wage at the time of employment, rather than on his earning capacity at the time the disease strikes. Second, its conclusion was based on a "realistic definition of the term injury," since the average person would not consider himself injured merely because, for example, asbestos fibers were embedded in his lung, which is when asbestosis begins. Finally, the court noted in *Black* that the trend in appellate law favored the "time of manifestation" approach with regard to various issues. *See SAIF Corp.*, 908 F.2d at 1439, 23 BRBS at 120-21 (CRT).

This trend has continued in the years since *Black* was issued. As the court noted in *SAIF Corp.*, Congress has codified *Black* with respect to several sections of the Act. Moreover, the manifestation rule has been applied to jurisdictional issues by other circuits. In *Gardner, supra*, 902 F.2d at 75-76, 23 BRBS at 74-76 (CRT), the United States Court of Appeals for the District of Columbia Circuit rejected the Board's holding that a claimant was provided coverage under the District of Columbia Workmen's Compensation Act of 1928, 36 D.C. Code § 501 *et seq.* (1973) based on exposure to injurious stimuli prior to the repeal of this Act in 1982. Following certification of the jurisdictional question to the District of Columbia Court of Appeals, 564 A.2d 1167 (D.C. 1989), the D.C. Circuit held that the law in effect at the time of manifestation governs the jurisdictional issue and that a claimant was provided coverage under the 1928 Act only if he is not covered under the new D.C. Act or any other state act. In *Castorina* v. *Lykes Brothers Steamship Co.*, 758 F.2d 1025, 17 BRBS 72 (CRT) (5th Cir. 1985), the United States Court of Appeals for the Fifth Circuit held that, for the purpose of determining whether the 1972 Amendments to the Longshore Act eliminating a longshoreman's seaworthiness remedy apply in an occupational disease case, the applicable law is the law in effect at the time of manifestation.

Similarly, the trend in occupational disease cases since the enactment of the 1984 Amendments to the Act has been to

define the term "injury" for purposes of Sections 12 and 13 as the date the deleterious effect of the disease manifests itself through a loss of wage-earning capacity or the presence of a permanent physical impairment. *See, e.g., Newport News Shipbuilding and Dry Dock Co* v. *Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Abel* v. *Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Brown* v. *I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Brown* v. *Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990); *Argonaut Ins. Co.* v. *Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988).

Given these developments in the Amendments to the Act and in the case precedent, we find the reasoning of the Ninth Circuit in *SAIF Corp.* compelling. Accordingly, the Board will follow the decision in *SAIF Corp.* in all circuits. Thus, coverage under the Act must be determined with reference to the law in effect at the time an injury becomes manifest, not at the time of the event which caused the injury.[3] To the extent they are inconsistent with this decision, *Paul* and its progeny are hereby overruled. In the instant case, manifestation of decedent's injury did not occur until he was diagnosed with lung cancer in November 1984. Therefore, under *SAIF Corp.*, the Act as amended in 1972 and 1984 applies to this case.

In order for a claimant to be covered under the post-1972 Act both the situs requirement of Section 3(a) and the status requirement of Section 2(3) must be satisfied. See *Martin, supra*; 33 U.S.C. §§ 902(3), 903(a). It is uncontested that decedent worked at employer's Electric Boat shipyard facility in Groton, Connecticut. Moreover, it is well settled that an

[3] In a case arising in the Ninth Circuit, the Board recently followed the rule in *SAIF Corp.* and held that the Act as amended in 1972 applied where a decedent, who had worked for the employer from 1939 to 1945, was not diagnosed as suffering from work-related lung cancer until 1973. *Martin* v. *Kaiser Company, Inc.*, 24 BRBS 112 (1990).

entire shipyard facility is considered a covered situs under the 1972 Amendments to Section 3(a) of the Act, 33 U.S.C. § 903(a).[4] *See Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Martin, supra*. Since employer's shipyard is a covered situs, decedent is covered by Section 3(a) as amended.

With regard to the status retirement of Section 2(3) of the Act as amended, 33 U.S.C. § 902(3),[5] the administrative law judge found, and it appears uncontested, that decedent's work in both the model and joiner shops consisted of building scale model components and battery wedges used in submarine construction. Decision and Order at 3. The Board and the courts have held that employees engaged in any aspect of shipbuilding, including construction of component parts, are considered maritime employees under Section 2(3) of the Act. *See Martin, supra*, 24 BRBS at 123. *See also Alford* v. *American Bridge Division, U.S. Steel Corp.*, 642 F.2d 807, 13 BRBS 268 (5th Cir. 1981), *modified on other grounds*, 655 F.2d 86, 13 BRBS

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[4] Section 3(a), 33 U.S.C. § 903(a) (Supp. V 1987) writes:

> Compensation shall be payable under this chaper in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

[5] The status requirement of Section 2(3), which was added to the Act by the 1972 Amendments, provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, *shipbuilder*, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3) (1982) (amended 1984) (emphasis added). The 1984 Amendments to Section 2(3) are not relevant to this case.

837 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (lst Cir. 1981); *Alabama Dry Dock & Shipbuilding Co.* v. *Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977). As there is no basis for concluding that decedent's work was not related to shipbuilding, he must be considered a maritime employee under Section 2(3). Thus, since the situs and the status requirements have been met, decedent is covered by the post-1972 Act. The administrative law judge's determination that decedent is not covered is accordingly reversed.[6]

Regarding the issue of causation, the administrative law judge, citing *Cardillo, supra*, stated that in occupational disease cases, "there is no 'injury' until the accumulated effects of the harmful substance manifest themselves and Claimant becomes aware of the relationship between the employment, the disease, and the death or disability." Decision and Order at 7. In apparently finding that the Section 20(a), 33 U.S.C. § 920(a), presumption of causation was not applicable, the administrative law judge determined that there was no substantial medical evidence of a relationship between decedent's employment at Electric Boat and his lung cancer. In this regard, the administrative law judge noted that decedent died from a metastatic adenocarcinoma of the lung, and that there was no reference in the death certificate to mesothelioma, a lung cancer attributable to asbestos exposure. The administrative law judge then credited the opinions of Drs. Godar and Capalbo. He found that Dr. Godar testified that he saw no evidence of asbestos exposure in decedent's x-rays and that his death was due to his many years of smoking.[7] According to the administrative law judge, Dr. Capalbo opined that decedent's tumor

[6] In light of our determination that decedent is covered by the applicable version of the Act, we need not address claimant's contentions pertaining to coverage under the pre-1972 Act.

[7] Decedent stopped smoking in 1974.

was not the classical form of tumor associated with asbestos. The administrative law judge, in addition, rejected Dr. Kerns' opinion that asbestos exposure contributed to the metastatic adenocarcinoma, on the basis that this opinion was premised on an incorrect assumption that claimant was exposed to asbestos.

Initially, we note that the administrative law judge's reliance on *Cardillo* is misplaced, as that case dealt primarily with the issue of responsible employer, not causation. Moreover, the administrative law judge improperly placed the burden of proving a relationship between an injury and employment on claimant. In order for the presumption under Section 20(a) of the Act, 33 U.S.C. § 920(a), to apply, claimant must establish a *prima facie* case that the employee suffered an injury and that an accident occurred or conditions existed which could have caused the injury. *See, e.g., Kelaita* v. *Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *See, e.g., Sinclair* v. *United Food & Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, there can be no question that decedent suffered an injury. Furthermore, the record is replete with evidence that conditions existed at employer's facility which *could* have caused decedent's lung cancer. Donald Beeney, who worked in the model/joiner shop from 1962 to 1967, testified that the workers were required to cut sheets of asbestos to such an extent that the shop would look like a snowstorm. Transcript of the Hearing at 40. Theodore Perkins, who also worked as a model/joiner during this period, corroborated this testimony by stating that he would often cut asbestos sheets using a table saw. Perkins Deposition at 7. Mr. Beeney further testified that there was no ventilation system in the model shop,

that masks or aspirators were not provided, that the pipes were insulated with asbestos, and that conditions in the joiner shop were the same. Transcript at 40-43, 61-62. This testimony was not contradicted. Thus, it is apparent that conditions existed at employer's facility where decedent worked which could have caused his lung cancer. We, therefore, hold that invocation of the Section 20(a) presumption is established as a matter of law.

Claimant contends that the administrative law judge mischaracterized the opinions of Drs. Godar and Capalbo. We agree. Dr. Godar opined that "cigarette smoking was far and away the prominent and likely cause of [decedent's] tumor," and that if decedent was exposed to asbestos, it would "have to be relegated to a very minor factor to be considered as a cancer inducer." Employer's Exhibit 9, at 12. He did not discount asbestos as potentially contributing to decedent's cancer. In a letter to Richard Carpenter, decedent's son-in-law, Dr. Capalbo stated that it was difficult to strongly suggest that decedent's adenocarcinoma "was from asbestos," but further stated: "I think that there certainly is reason to believe that the combination of the asbestos exposure and the smoking history resulted in the tumor." Claimant's Exhibit 2. Under the aggravation rule, if an employment related injury contributes to, combines with, or aggravates an underlying condition to result in death or disability, the entire resultant condition is compensable; the relative contributions of the work-related injury and the prior condition are not weighed. *See generally Independent Stevedore Co.* v. *O'Leary*, 357 F.2d 812 (9th Cir. 1966); *LaPlante* v. *General Dynamics Corp./Electric Boat Div.*, 15 BRBS 83 (1982). It is employer's burden on rebuttal to come forward with substantial countervailing evidence that the work injury did not cause, contribute to or accelerate the underlying condition. *See generally Rajotte* v. *General Dynamics Corp.*, 18 BRBS 85 (1986). In this case, neither doctor's opinion

severs the potential connection between decedent's injury and death, and his asbestos exposure. Thus, rebuttal of the Section 20(a) presumption cannot be found and employer is liable for the resultant disability and death. *See Obert* v. *John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Accordingly, the administrative law judge's finding of no causation is reversed.

Inasmuch as decedent's death was, as a matter of law, work-related, claimant is hereby awarded death benefits pursuant to Section 9 of the Act, 33 U.S.C. § 909. Moreover, as causation has been established, claimant is also entitled to medical expenses pursuant to Section 7 of the Act, 33 U.S.C. § 907. The case is remanded to the administrative law judge for consideration of decedent's entitlement to disability benefits from November 3, 1984 to December 1, 1984, and any other issues necessary to the award.

Accordingly, the Decision and Order of the administrative law judge denying benefits is reversed, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

BRB No. 89-4097: *Freelove Peterson (Widow of Paul Freelove)* v. *General Dynamics Corporation and Insurance Company of North America* (Case No. 88-LHCA-3153) (OWCP No. 01-0088208)

I certify that this Decision and Order was sent this day to:

SEP 30 1991

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1068 — August Term, 1991

(Argued: April 1, 1992 Decided: July 16, 1992)

Docket No. 91-4193

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

– against –

U.S. DEP'T LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; FREELOVE PETERSON, (Widow); PAUL PETERSON, (Decedent),
Respondents.

Before: MINER and McLAUGHLIN, *Circuit Judges*, and MARTIN, *District Judge*.[1]

Petition for review of *en banc* order of United States Department of Labor Benefits Review Board awarding widow of deceased employee death benefits under Longshore and Harbor Workers' Compensation Act after applying law in effect on date of manifestation of cancer, rather than law in effect at time of last exposure to asbestos which caused the disease.

Petition for review denied.

Judge Martin dissents in a separate opinion.

RICHARD N. CURTIN, Boston, MA (Scott E. Richardson, Parker, Coulter, Daley & White, Boston, MA; of counsel) *for Petitioner*.

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[1] Honorable John S. Martin, Jr., United States District Judge for the Southern District of New York, sitting by designation.

SAMUEL J. OSHINSKY, Washington, DC (Marshall J. Breger, Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore, Washington, DC, of counsel) *for Respondent Director, Office of Workers' Compensation Programs.*

MATTHEW SHAFNER, Groton, CT (Amy M. Stone, Carolyn P. Kelly, O'Brien, Shafner, Bartinik, Stuart & Kelly, Groton, CT, of counsel) *for Respondents Freelove Peterson (Widow) and Paul Peterson (Decedent).*

MINER, *Circuit Judge*:

Petitioner Insurance Company of North America ("INA") seeks review of a United States Department of Labor Benefits Review Board ("BRB" or the "Board") order awarding death benefits to Respondent Freelove Peterson, widow of Respondent Paul Peterson, under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act"), 33 U.S.C. §§ 901 *et seq*. Decedent Paul Peterson was hospitalized in November 1984 and diagnosed as having a malignant lung tumor. The tumor was caused, at least in part, by Peterson's exposure to asbestos while working as a submarine builder in the 1960s. Approximately one month after entering the hospital for treatment, Peterson died from the ailment. Thereafter, Mrs. Peterson filed two claims under the LHWCA. The first, on behalf of her husband, sought disability benefits for the period of his hospitalization. The second sought death benefits for herself as his surviving widow.

An Administrative Law Judge ("ALJ") heard the case and found that the LHWCA in effect in 1967, the date of Peterson's last possible exposure to asbestos, applied. Benefits were denied upon a finding that Peterson's injury did not meet the situs requirement, as defined in the Act prior to amendment in 1972, that the injury occur "upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. § 903(a) (superseded). Mrs. Peterson appealed to the Board, which reversed the ALJ's decision. The Board ruled that, in cases of long latency diseases caused by exposure to harmful stimuli, the appropriate law to apply is the law in effect on the date the disease manifests. The Board then applied the LHWCA as amended in 1972 and determined that Peterson met the definition of employee under the amended Act, 33 U.S.C. § 902(3), and that he had been injured at an appropriate situs as redefined by the amendment, 33 U.S.C. § 903(a).

Thus, the BRB awarded death benefits to Mrs. Peterson and remanded to the ALJ for calculation of disability benefits.

On appeal, INA argues that the BRB erred when it utilized the law in effect on the date of manifestation of the disease. INA maintains that the law in effect at the time of last exposure should govern because nothing in the language of the Act, amendments, or the legislative history indicates that the date of manifestation rule should be used to determine the applicable law. Additionally, INA contends that use of the manifestation rule results in an impermissible retroactive application of the amended Act by expanding the class of individuals entitled to recover for exposures occurring prior to the amendments' effective date. The Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director") agrees with this position but nevertheless urges us to affirm the BRB's award of benefits on the alternate ground that substantial evidence supports a finding that Peterson was exposed to asbestos upon the navigable waters of the United States as defined in the pre-1972 Act. INA, on the other hand, maintains that the ALJ was correct in finding that Peterson was not injured upon the navigable waters of the United States and that recovery therefore should be denied. We conclude that the Board did not err in holding that the law in effect on the date of manifestation of the cancer is the appropriate law to apply, and hence deny the petition for review. As such, we need not address the alternate ground for affirmance proposed by the Director.

BACKGROUND

Decedent Paul Peterson worked alternately as a carpenter and a joiner for General Dynamics Corporation in its Electric Boat Division between November 13, 1962, and January 6, 1967. The Division was located on the Thames River in Groton,

Connecticut. While at General Dynamics, Peterson worked in the "Model Shop," assembling scale models of components used in submarine construction, and in the "Joiner Shop," building battery wedges for submarines. Both jobs required Peterson to perform certain tasks inside submarines located on the river, although he spent the majority of his time working in the buildings located on land adjacent to the river. Testimony before the ALJ established that Peterson inhaled asbestos in both the Model and Joiner Shops, and possibly while aboard the submarines as well.

After leaving General Dynamics in 1967, Peterson worked at a variety of occupations. On November 3, 1984, he entered the hospital with breathing problems. Tests revealed a cancerous tumor in his lung and he remained hospitalized for treatment. Approximately one month later, Peterson died of the ailment. His death certificate reported the cause of death as metastatic lung cancer due to, or resulting from, chronic obstructive lung disease.

In late 1985, Peterson's wife received a letter from one of the treating physicians, advising her of the possibility that her husband's ailment had resulted from his exposure to asbestos during his tenure at General Dynamics. Mrs. Peterson timely notified the appropriate parties of Peterson's disability and death. *See* 33 U.S.C. § 912(a). She filed a claim for disability benefits on behalf of her deceased husband at that time, and later submitted a claim for death benefits as his surviving widow. Both claims were filed within the statute of limitations period set forth in the Act. *See id.* § 913(a).

An initial attempt to negotiate a settlement failed, and a hearing before an ALJ was scheduled. After the hearing, the ALJ concluded that the law in effect at the time Peterson was last exposed to asbestos controlled the outcome. In order to be compensated under the Act in effect on January 6, 1967, the last date Peterson possibly could have been exposed, an

employee must have been disabled by, or died from, an injury occurring "upon the navigable waters of the United States (including any dry dock)." *Id.* § 903(a) (superseded). The ALJ found that Peterson's asbestos exposure had occurred in buildings located on land adjoining the Thames, not upon the river (or a dry dock), and therefore held that benefits should be denied because the LHWCA did not cover Peterson.

Mrs. Peterson appealed to the Board. In an *en banc* decision, the Board ruled that the ALJ's decision to utilize the law in effect at the time of last exposure was improper. The Board held that the law in effect on the date of manifestation of a long latency disease should be employed to determine eligibility for benefits under the LHWCA. Since Peterson's cancer manifested in 1984, the Board determined that the Act as amended in 1972 provided the appropriate test for coverage. The Board found that Peterson met the statutory definition of employee and that he was injured at a situs embraced by the amended Act. Hence, the Board awarded death benefits to Mrs. Peterson and remanded to the ALJ for calculation of disability benefits. INA appealed to this Court before the ALJ calculated the benefits, but the calculation has since been completed. Therefore, jurisdiction is appropriate under 33 U.S.C. § 921(c). *See St. Louis Shipbuilding & Steel Co.* v. *Casteel*, 583 F.2d 876, 876 n.1 (8th Cir. 1978); *Nacirema Operating Co.* v. *Lynn*, 577 F.2d 852, 853 n.1 (3d Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

DISCUSSION

The issue in this case concerns the scope of coverage of the LHWCA, as amended in 1972. Prior to 1972, section 3(a) of the Act provided compensation to employees suffering a disability or death "result[ing] from an injury occurring upon the navigable waters of the United States (including any dry dock)."

33 U.S.C.S § 903(a) (superseded). This language imposed an injury situs requirement in order for an employee to invoke the LHWCA such that workers in maritime-related occupations could not apply for compensation under the LHWCA if their injuries occurred on land or on structures attached to land. *See generally Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). In 1972, Congress enacted the Longshore and Harbor Workers' Compensation Act Amendments, Act of October 27, 1972, Pub. L. No. 92-576, §§ 2(c), 21, 86 Stat. 1251, 1265, amending, *inter alia*, section 3(a) of the Act to permit compensation for injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). The amendment thereby broadened the areas at which injury could occur for employees to qualify for compensation under the Act.

At the same time, Congress enacted a status requirement for recovery, allowing only certain defined classes of employees to qualify for compensation under the Act when injured. *See* 33 U.S.C. § 902(3). No one disputes that Peterson, by virtue of his occupations as a carpenter and a joiner assisting in submarine building, meets the status requirement. The question of whether he meets the situs requirement is at issue. Specifically, at the time of Peterson's *exposure* to asbestos (1962-67), the LHWCA did not provide benefits for any disability or death resulting strictly from an injury, i.e. exposure to asbestos, occurring in either the Model or Joiner Shops, because the Shops were in buildings located on land. At the time his cancer *manifested* (1984), however, the situs requirement had been amended to include injuries occurring in buildings situated on land adjoining navigable water. The issue, therefore, is whether the expanded situs requirement provided after the 1972 amendments applies to employees and their sur-

vivors if the employee was exposed before the effective date of the amendments, but was disabled or died after the effective date of the amendments, when the disease manifested.

An injury causing disability or death triggers the provisions of the Act. 33 U.S.C. § 903(a). Hence, we must determine when Peterson was injured in order to determine which situs requirement to apply. If the injury happened on the date of last exposure, the pre-1972 Act situs requirement must be met. On the other hand, if the injury took place on the date the cancer manifested, the amended Act supplies the situs test. We therefore turn to the definition of the date of injury for purposes of the Act.

INA and the Director claim that Peterson's injury occurred on the date he was last exposed to asbestos. The Director also argues that we should defer to his position because it represents an administrative agency interpretation of a statute, *see Martin* v. *Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1175-76 (1991). We previously have ruled that the Director is not entitled to special deference in the face of a Board ruling, *Director, OWCP* v. *General Dynamics Corp. (Krotsis)*, 900 F.2d 506, 510 (2d Cir. 1990), but the Director contends that, in light of *Martin*, *Krotsis* should be overruled. We need not address the continued vitality of *Krotsis*, however, as it is well settled that, even where deference is owed, if the agency's construction of the statute is unreasonable or contrary to the statute or clear legislative intent, a court will not defer to it. *See Martin*, 111 S. Ct. at 1175-76; *Wilson* v. *United States*, 959 F.2d 12, 15 (2d Cir. 1992) (citations omitted). We find the Director's construction of the amended section 903(a) unreasonable.

Recently, the Ninth Circuit directly addressed this issue in *SAIF Corp./Oregon Ship* v. *Johnson*, 908 F.2d 1434 (9th Cir. 1990), a decision upon which the BRB chiefly relied in reaching its decision in this case. In *SAIF Corp.*, the court held that

the date of manifestation of a long latency disease, in that case asbestosis caused by asbestos inhalation, constituted the date of injury for purposes of section 903(a). *Id.* at 1438-40. As here, the disabled worker in *SAIF Corp.* was exposed to asbestos on land adjoining the navigable waters of the United States before the effective date of the 1972 amendments. The asbestosis did not manifest until 1979. *Id.* at 1435-36. The Ninth Circuit applied the situs requirement of the amended Act based on the date the disease manifested and thereby permitted the employee to recover.

Relying on its prior decision in *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), the Ninth Circuit in *SAIF Corp.* held that the employee's " 'injury' occurred when 'the occupational disease manifested itself through a loss of wage-earning capacity.' " *SAIF Corp.*, 908 F.2d at 1439 (quoting *Black*, 717 F.2d at 1291). *Black* was decided in the slightly different context of determining the time of injury for purposes of computing disability benefits under the LHWCA. Nonetheless, *SAIF Corp.* adopted the three reasons set forth in *Black* for utilizing the date of manifestation approach. First, the manifestation rule best comports with the LHWCA's "paramount goal" of compensating workers for lost earning capacity stemming from occupational diseases. Second, the date of manifestation most realistically defines when the injury occurs because a person would not consider himself injured at the time of exposure. Finally, the trend in statutes and court decisions in instances of diseases with long latency periods favors application of the manifestation rule. *Id.* at 1439 (quoting *Black*, 717 F.2d at 1289). *Black* also had rejected the argument that "the date of last exposure rule protects employers and their insurers from liability disproportionate to that which was anticipated at the time the insurance was purchased." *Black*, 717 F.2d at 1292. This rationale "unjustifiably place[s] the burden of unantici-

pated liability on injured workers rather than on employers and insurers." *Id.*

In addition to *SAIF Corp.* and *Black*, two other cases have applied the manifestation rule to comparable aspects of the LHWCA. In *Castorina* v. *Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985), the Fifth Circuit ruled that the date of manifestation of asbestosis controlled the determination of whether an injury occurred before or after the 1972 amendments. In that case, an employee had brought an unseaworthiness claim against the owner of the vessel on which he had worked. Such a claim was permissible before the 1972 amendments, but impermissible thereafter. *Id.* at 1028. The court, relying in part on *Black*, noted that "a worker who is exposed to asbestos or similar fibers does not always contract pulmonary disease. The date of injury, therefore, is most realistically defined as the date that the disease actually manifests itself." *Id.* at 1031. The Fourth Circuit likewise concluded that the manifestation rule applies in LHWCA cases in the context of determining when to utilize the special fund created pursuant to section 8(f) of the LHWCA, 33 U.S.C. § 908(f). *Newport News Shipbuilding and Dry Dock Co.* v. *Harris*, 934 F.2d 548, 551-52 (4th Cir. 1990) (citations omitted).

We find the reasoning of these opinions compelling. In addition, the long established rule in this circuit is that, in LHWCA cases of latent disease, the statute of limitations does not begin to run until the disease manifests. *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 142-43 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Hence, even under the pre-1972 Act, the statute of limitations did not commence running until Peterson's injury manifested. This rule recognizes that, while Peterson's inhalation of asbestos certainly produced the tumor which injured him, a causal event, such as inhalation, is not necessarily an injury, nor does it necessarily define when the injury occurred.

Cf. Banks v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (upholding award of benefits based on finding of causal connection between injury upon navigable waters and fall at home several hours later); *Andras* v. *Donovan*, 414 F.2d 241, 243 (5th Cir. 1969) (per curiam) ("It is well established that an injury occurring on land may be compensable under the [LHWCA] — if its cause originated on the water.") (citations omitted); *Mississippi Shipping Co.* v. *Henderson*, 231 F.2d 457, 459 (5th Cir. 1956) (benefits awarded for heart attack on shore resulting from injury on water). In fact, Peterson worked for almost eighteen years after the last date he possibly could have been exposed. While his body throughout that time may have been reacting to the asbestos, without any overt deleterious effects, we see no cause in the present context for deviating from the manifestation rule in determining when Peterson was injured. *See Grain Handling Co.* v. *Sweeney*, 102 F.2d 464, 466 (2d Cir.) (Learned Hand, J.) ("The [LHWCA] is not concerned with pathology, but with industry disability; and a disease is no disease until it manifests itself."), *cert. denied*, 308 U.S. 570 (1939).

This principle is in keeping with the Act's requirement that the injury must result in disability or death before compensation can be sought. Under the terms of the Act itself, the cause of action does not arise until disability or death occurs. 33 U.S.C. § 903(a). Thus, there can be no justification for applying the law in effect at the moment of last exposure, because at that time, even if the situs requirement were met, Peterson was not entitled to invoke the Act or maintain a suit thereunder until his injury resulted in disability or death. *See State Ins. Fund* v. *Pesce*, 548 F.2d 1112, 1114 (2d Cir. 1977).

Pesce dealt with the question of the retroactivity of the 1972 amendments to the LHWCA. Those amendments expanded the availability of death benefits under the Act to the survivors of injured employees, even if the injury did not cause death. *Id.*

Prior to 1972, only those survivors of employees who died as a result of their injuries could recover death benefits. We ruled, as did many other circuits, that because the right to death benefits was a separate cause of action which did not accrue until death, the law in effect at the time the cause of action became viable, i.e. when the employee died, determined the survivors' entitlement to death benefits. *Id.*; *see also Travelers Ins. Co.* v. *Marshall*, 634 F.2d 843, 846-49 (5th Cir. 1981); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467, 469-70 (lst Cir. 1979); *Todd Shipyards Corp.* v. *Witthuhn*, 596 F.2d 899, 901-02 (9th Cir. 1979); *Casteel*, 583 F.2d at 877-78; *Lynn*, 577 F.2d at 853-54; *Norfolk, Baltimore & Carolina Lines, Inc.* v. *Director, OWCP*, 539 F.2d 378, 380-81 (3d Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977). In so ruling, we rejected the argument, advanced here by INA and the Director, that the statute was being applied retroactively. "Because the death which gave rise to application of the amendment occurred after the amendment's effective date, . . . the amendment was being applied only prospectively, not retrospectively." *Pesce*, 548 F.2d at 1114; *see also Puig*, 599 F.2d at 470; *Witthuhn*, 596 F.2d at 902; *Lynn*, 577 F.2d at 854.

Likewise, the disease which gave rise to Mrs. Peterson's current claims did not disable or kill her husband until after the amendment's effective date. Thus, the Director's contention that use of the date of manifestation results in retroactive application of the 1972 amendment is incorrect. There is no basis on which to distinguish between the present case and *Pesce* as both involved an expansion by the 1972 amendments to the LHWCA of the class of persons entitled to benefits under the Act.

CONCLUSION

Based on the foregoing, we conclude that the date of manifestation of an occupational disease with a long latency period determines whether the LHWCA as amended applies to an employee or survivor seeking benefits thereunder. The BRB properly granted benefits under the LHWCA as amended in 1972. The petition for review of the Benefits Review Board order is denied.

MARTIN, District Judge, dissenting:

Paul Peterson was employed by General Dynamics at the Electric Boat Division in Groton, Connecticut, from 1962 to 1967. For the entire time he was employed there he worked in the Model Shop and Joinder Shop. Since these facilities were not "upon navigable waters of the United States" his work there was not covered under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act). Therefore, had he been injured at work in 1967, he would not have been entitled to compensation from his employer under the LHWCA. Indeed, it is undisputed that had it been determined at any time prior to 1972 that Peterson had contracted cancer as a result of exposure to asbestos in either the Model Shop or Joinder Shop between 1962 and 1967, he would not have had a claim against his employer. This result is logical — since Peterson's workplace was not covered under the Act, his employer had no liability to him under the Act for injuries he sustained there.

The Court holds today, however, that because of a change in the law in 1972 extending coverage to employees such as Peterson, that Peterson's estate is entitled to compensation under the Act for injuries he sustained between 1962 and 1967.

As this Court noted in *Weise* v. *Syracuse University*, 522 F.2d 397, 411 (2d Cir. 1975):

> The manifest injustice of such *ex post facto* imposition of civil liability is reflected in the general rule of construction that absent clear legislative intent statutes altering substantive rights are not to be applied retroactively.

See also Bowen v. *Georgetown University Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471 (1988) ("retroactivity is not favored in the law").

By adopting a manifestation trigger for coverage under the amended LHWCA, the majority creates a legal liability for Peterson's employer that did not exist at the time of his employment. At the same time the majority states that the Director's contention that this "results in retroactive application of the 1972 amendment is incorrect." (Opinion, p. 15).

The flaw in the majority's reasoning is apparent if one simply follows the logical consequences of one of its statements. The majority states, "we must determine when Peterson was injured to determine which situs requirement to apply." (Opinion, p. 9). It then determines that he was injured in 1984 when his cancer manifested itself. If that is true, Peterson was injured in the hospital where the medical tests were administered, not "upon the navigable waters" or any adjoining area under the control of General Dynamics. Clearly, the manifestation of Peterson's cancer did not establish either the time or the place of his injury.

The majority relies heavily on the reasoning in *SAIF Corp./Oregon Ship* v. *Johnson*, 908 F.2d 1434 (9th Cir. 1990) to support its contention that the manifestation trigger should apply. However, the *SAIF Corp.* court failed to consider the crucial distinction between applying a new rule retroactively

to create an entirely new liability, and the retroactive application of a statute dealing only with procedures or remedies.

In *SAIF Corp.*, the court relied on its prior holding in *Todd Shipyards Corp.* v. *Black*, 717 F. 2d 1280 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), as the basis for utilizing the date of manifestation rule in cases involving diseases with long latency periods. *SAIF Corp.*, 908 F.2d at 1439-40. Although the majority recognized that "*Black* was decided in a slightly different context" they embraced, without question, that court's justifications for applying a manifestation trigger. (Opinion, P.11).

In *Black*, the court held that "the date the disease manifests itself determines the time of injury for purposes of calculating compensation levels." *Black*, 717 F.2d at 1293. Thus, *Black* concerned only the extent of an existing liability. The question before the Court today, however, is whether the Petitioner should incur a new substantive liability.* As noted above, it is well established that courts will avoid retroactive application of law that creates new substantive rights. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 720, 94 S. Ct. 2006, 2020-21 (1974).

The *SAIF Corp.* court cited language in *Black* that, "'[i]n cases of disease with long latency periods, the trend is clearly toward the application of the time of manifestation rule.'" *SAIF Corp.*, 908 F.2d at 1439 (quoting *Black*, 717 F.2d at 1290). In all but one instance, however, the cases cited to establish this trend involved a procedural issue — the tolling of the statute of limitations — rather than a new substantive claim.*

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* The D.C. Court in *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir), *cert. denied*, 449 U.S. 905 (1980), recognized that extension of the Act's "protection to certain workers engaged in maritime employment who were not previously covered," changed principles of substantive law.

* The *Black* court cited *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 115-117 (D.C. 1982) (manifestation of disease triggered statute of limitations for

It is, of course, appropriate for courts to apply different triggers in cases that implicate different policy considerations. If a person sustains a compensable injury of which he is unaware, it would be unreasonable to suggest that the statute of limitations should begin to run before the injury manifests itself. It is equally unreasonable to impose a new liability on a party long after the event, when the party no longer has the opportunity to modify its conduct so as to avoid liability or to make a reasoned choice among alternative courses of action in light of the economic consequences that might be reasonably anticipated. Not surprisingly, this distinction has regularly been recognized by the courts. *Compare Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1220 (6th Cir. 1980) (time of last exposure triggered coverage under insurance policy) *with Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1157 (6th Cir. 1981) (date of manifestation triggered statute of limitations).

The *Black* court cited only one case that involved a substantive issue, *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Ins. Co.*, 682 F.2d 12 (lst Cir. 1982), *cert. denied*, 460 U.S. 1028, 103 S. Ct. 1279 (1983). In *Eagle-Picher*, the court established the date of manifestation of disease as the trigger for coverage under a Comprehensive General Liability policy ("CGL").* *Eagle-Picher*, 682 F.2d at 19. The holding in *Eagle-Picher*, however, has not persuaded this or other circuits to follow its lead. The Third, Fifth, Sixth and Eleventh Circuits have all ruled that coverage under a CGL policy is triggered by exposure

for asbestosis); *Urie* v. *Thompson*, 337 U.S. 163, 69 S. Ct. 1018 (1949) (manifestation of disease triggered statute of limitations for silicosis); *Todd Shipyards Corp.* v. *Allan*, 666 F.2d 399, 401 (9th Cir.), *cert. denied*, 459 U.S. 1034, 103 S. Ct. 444 (1982) (manifestation of disease triggered statute of limitations for purposes of LHWCA); and *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1158 (6th Cir. 1981) (manifestation of disease triggered statute of limitations for asbestosis), as cases establishing a trend toward the use of the date of manifestation trigger. *Black*, 717 F.2d at 1290.

*The CGL is a standard-form insurance policy that was introduced by the insurance industry in the mid-1960's. The policy was designed to provide liability coverage for injuries caused over a period of time.

to asbestos during the policy period. *See ACandS Inc.* v. *Aetna Casualty & Surety Co.*, 764 F.2d 968, 973 (3rd Cir. 1985); *Porter* v. *American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir.), *cert. denied*, 454 U.S. 1109, 102 S. Ct. 686 (1981); *Forty-Eight Insulations*, 633 F.2d at 1223; *Commercial Union Ins. Co.* v. *Sepco Corp.*, 765 F.2d 1543, 1545-46 (11th Cir. 1985).

This Circuit rejected a manifestation trigger in *American Home Products Corp.* v. *Liberty Mutual Ins. Co.*, 748 F.2d 760, 764 (2d Cir. 1984), which established injury in fact as the appropriate trigger for asbestos injuries in cases arising under a CGL policy. In rejecting the date of manifestation approach, this Court noted that "the manifestation of the injury may well occur after the injury itself." *Id.* at 764. Under the injury-in-fact analysis injury is deemed to have occurred when injury can be proved to have arisen during the relevant period. *Id.* Clearly, *American Home Products* is a more appropriate precedent for us to follow than *Eagle-Picher*.

While there is nothing in the record before us to indicate when asbestos exposure creates an injury in fact, other courts have found that the injury occurs at the time of exposure. *See Forty-Eight Insulations*, 633 F.2d at 1218 (medical testimony established asbestos injury occurs upon inhalation); *American Optical Corp.*, 641 F.2d at 1144 (medical opinion established each inhalation of asbestos was bodily injury).

Applying the injury in fact approach here, the date of injury for purposes of the LHWCA is during the period of exposure to the asbestos particles. Because the decedent left General Dynamics in 1967, any exposure to asbestos, and thus any "injury," occurred prior to the amended Act.

In any event, this Court should not use the trigger concept to gloss over the reality of the factual record before it. There is no logical basis for avoiding the conclusion that a change in the law in 1972 is being applied to impose liability for con-

duct occurring between 1962 and 1967. We should sanction this result only if we are willing to conclude that Congress intended the 1972 amendments to apply retroactively.[4]

In *Bradley* v. *Richmond School Board*, 416 U.S. 696, 94 S. Ct. 2006 (1974), the Supreme Court enunciated three factors that a court should examine in the absence of clear legislative intent to determine whether retroactive application of a statute would result in a manifest injustice: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact on the change in law upon those rights. *Bradley*, 416 U.S. at 717, 94 S. Ct. at 2019.

The first prong of the *Bradley* "manifest injustice" test distinguishes between litigation involving private parties only and litigation that involves a public entity. *Bradley*, 416 U.S. at 718, 94 S. Ct. 2019. Here, the case is between private parties only. The Respondent is not acting in the role of a "private attorney general." *Bradley*, 416 U.S. at 719, 94 S. Ct. at 2020. Rather, she is pursuing a course of private litigation for her own benefit. Thus, the first factor weighs in favor of not applying the statute retroactively.

The second prong of the *Bradley* "manifest injustice" test concentrates on determining whether retroactive application of the statute would "infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720, 94 S. Ct. at 2020-21. Here, the Respondent seeks a remedy under a cause of action that was non-existent prior to the amended LHWCA. Thus, the 1972 amendments created a new substantive right for the Respondent, and a new substantive liability for the Petitioner. Because retroactively expanding

[4] Following the 1972 amendments, Congress adopted the date of manifestation trigger for section 910 (compensation), and sections 912 and 913 (statute of limitations), indicating Congressional intent to apply these sanctions retroactively. Congress has not, however, altered section 903(a), which is at issue here. This strongly suggests that Congress did not intend to have this section applied retroactively.

the class of workers covered under the LHWCA would create new legal responsibilities for past conduct, and would infringe upon the Petitioner's vested rights, this weighs in favor of not applying the statute retroactively.

The final prong of the *Bradley* "manifest injustice" test concerns the "possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720, 94 S. Ct. at 2021. This requires that "the court determine whether a party would have sought to alter its conduct in light of the new standards." *Jackson* v. *Bankers Trust*, No. 88 Civ. 4786, 1992 WL 111105, at *8 (S.D.N.Y. April 27, 1992). Every employer with workers covered under the LHWCA is required to "secure the payment to [its] employees of the compensation payable under" the Act. 33 U.S.C. § 904(a). The employer fulfills this duty by either purchasing insurance or by self-insuring. 33 U.S.C. § 932(a)(1). Here, at the time of employment, the Petitioner was not statutorily required to obtain insurance to cover claims by the decedent's widow.

Thus, the analysis required by *Bradley* compels the conclusion that the 1972 amendments to the LHWCA should not be applied retroactively. Since I believe the majority is applying those amendments retroactively, I dissent.

§ 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)

. . . . . .

1972—Subsec. (a). Pub. L. 92-576. § 2(c), substituted provisions respecting coverage of injuries occurring upon navigable waters of the United States, including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel, for prior provisions respecting coverage of such injuries upon navigable waters and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

. . . . . .

904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

. . . . . .

§ 905. Exclusiveness of liability

. . . . .

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

. . . . .

§ 908. Compensation for disability

. . . . .

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury

falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

(2)(A) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title, except that the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 932(a) of this title.

(B) After cessation of payments for the period of weeks provided for in this subsection, the employer or carrier responsible for payment of compensation shall remain a party to the claim, retain access to all records relating to the claim, and in all other respects retain all rights granted under this chapter prior to cessation of such payments.

(3) Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

. . . . .

§ 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured ermployee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of

the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d)(1) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs —

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 906(b) of this title) applicable at the time of the injury.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent local disability or death arising out of injuries subject to this chapter shall be increased by the lesser of —

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

(g) The weekly compensation after adjustment under subsection (f) of this section shall be fixed at the near dollar. No adjustment of less than $1 shall be made, but in no event shall compensation or death benefits be reduced.

(h)(1) Not later than ninety days after October 27, 1972, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's weekly wage the applicable national average weekly wage determined under section 906(b) of this title and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following October 27, 1972, and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on October 27, 1972; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on October 27, 1972. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this chapter at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following October 27, 1972. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 944 of this title, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to October 27, 1972, shall be considered to have occurred on the day following such date.

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employer or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

§ 912. Notice of injury or death

(a) Time limitation

Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in the case of an occupational disease which does not immediatley result in a disability or death, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given

(1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

(b) Form and content

Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in the case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Delivery requirements

Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred. Each employer shall designate those agencies or other responsible officials to receive such notice, except that the employer shall designate as its representatives individuals among first line supervisors, local plant management, and personnel office officials. Such designations shall be made in accordance with regulations prescribed by the Secretary and the employer shall notify his employees and the Secretary of such designation in a manner prescribed by the Secretary in regulations.

(d) Failure to give notice

Failure to give such notice shall not bar any claim under this chapter (1) if the employer (or his agent or agents or other responsible official or officials designated by the employer

pursuant to subsection (c) of this section) or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by the employer pursuant to subsection (c) of this section, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection (c) of this section, or (ii) for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

§ 913. Filing of claims

. . . . . .

(b) Failure to file

(1) Notwithstanding the provisions of subsection (a) of this section failure to file a claim within the period prescribed in such subsection shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(2) Notwithstanding the provisions of subsection (a) of this section, a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the

exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

. . . . . .

§ 919. Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . . . . .

(c) Investigations; order for hearing; notice; rejection or award

The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an

award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subsection (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5. Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

. . . . .

§ 921. Review of compensation orders

. . . . .

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision

in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

. . . . .

Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, the the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensure to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

Supreme Court, U.S.
FILED
JAN 15 1993

No. 92-730

In the Supreme Court of the United States

OCTOBER TERM, 1992

INSURANCE COMPANY OF NORTH AMERICA, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the 1972 amendment to Section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), which expanded the Act's coverage to include additional land-based injuries, applies to an employee exposed to asbestos before 1972 on a situs not then covered by the Act who becomes disabled and dies after the effective date of the 1972 amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-730

INSURANCE COMPANY OF NORTH AMERICA, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-20a) is reported at 969 F.2d 1400. The decision of the Benefits Review Board (Pet. App. 34a-44a) is reported at 25 Ben. Rev. Bd. Serv. (MB) 71 (1991). The decision of the administrative law judge (Pet. App. 24a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1992. The petition for a writ of certiorari was filed on October 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1962 until 1967, decedent Paul Peterson was employed as a carpenter and joiner at a Connecticut shipyard operated by General Dynamics Corporation; petitioner was the workers' compensation carrier for the shipyard's employees. Peterson was exposed to asbestos while working in the shipyard's Model Shop and in its Joiner Shop, both of which were located on land adjacent to a navigable river. He also worked aboard submarines on the river. Pet. App. 5a-6a, 26a.

On November 3, 1984, Peterson was hospitalized for shortness of breath, and tests revealed that he had lung cancer. He died at age 76 on December 1, 1984; the death certificate reported the cause of death as metastatic lung cancer due to chronic obstructive lung disease. Pet. App. 6a, 27a. Three physicians later diagnosed his tumor as metastatic adenocarcinoma and offered varying opinions as to the respective contributions of asbestos exposure and cigarette smoking to his disease. *Id.* at 28a-30a. Peterson's widow, respondent Freelove Peterson, filed timely claims for both lifetime disability and death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.* Pet. App. 6a, 27a-28a.

2. After a hearing, a United States Department of Labor administrative law judge (ALJ) found no liability under the Act. Pet. App. 24a-33a. As a threshold matter, the ALJ held that LHWCA coverage is determined "with reference to the law in effect at the time of the event which caused the injury, regardless of when the full effect of the injury becomes manifest." *Id.* at 30a. Since Peterson's work-related asbestos exposure occurred from 1962 to 1967, the ALJ applied the Act's coverage provision, Section 3(a), as it existed before its amendment in 1972. 44 Stat. 1426. Pet. App. 30a. Prior to 1972,

the LHWCA provided compensation only for "disability or death result[ing] from an injury occurring upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970). The ALJ found "no direct evidence" that Peterson had been exposed to asbestos aboard submarines during the course of his employment with General Dynamics, and thus concluded that there was "no exposure to asbestos on a situs covered by the pre-1972 Act" and consequently no injury within the coverage of the Act. Pet. App. 30a.[1]

3. The Benefits Review Board, sitting en banc, reversed and awarded benefits. Pet. App. 34a-44a. The Board noted that it had previously determined, like the ALJ in this case, that coverage should be governed by the law in effect at the time of exposure to the injurious stimuli, regardless of when the full effect of that exposure became manifest. *Id.* at 36a-37a. In this case, however, the Board decided to change its approach and to determine coverage under the Act "with reference to the law in effect at the time an injury becomes manifest, not at the time of the event which caused the injury." *Id.* at 39a.

In reaching that conclusion, the Board relied heavily on the Ninth Circuit's decision in *SAIF Corp./Oregon Ship* v. *Johnson*, 908 F.2d 1434 (1990), which held that the 1972 amendment expanding coverage under the LHWCA was applicable to occupational diseases that manifest themselves after 1972 as a result of pre-1972 exposure to hazardous materials. Pet. App. 37a-39a. The Board also relied on what it described as a continuing "trend" towards using the time of manifestation of occupational

[1] The ALJ also addressed the merits of the claims, finding "no substantial medical evidence of a relationship between" Peterson's employment from 1962 to 1967 and his lung cancer and death in 1984. Pet. App. 32a.

disease to decide various issues under the LHWCA. *Id.* at 38a. It observed that two courts of appeals have applied a manifestation rule to decide other LHWCA coverage issues. *Ibid.* (citing *Railco Multi-Construction Co.* v. *Gardner*, 902 F.2d 71, 74-76 (D.C. Cir. 1990), and *Castorina* v. *Lykes Bros. S.S. Co.*, 758 F.2d 1025 (5th Cir.), cert. denied, 474 U.S. 846 (1985)). In addition, the Board noted that the 1984 amendments to the LHWCA had codified the manifestation rule with respect to several other provisions of the Act. Pet. App. 37a-38a. Accordingly, the Board decided to overrule its previous decisions and henceforth follow *SAIF Corp.* in all circuits. Pet. App. 39a.

The Board then found that Peterson was a covered employee under the LHWCA as amended in 1972. Pet. App. 39a-41a. In particular, he met the "situs" requirement for coverage under the Act because the entire shipyard facility where he worked was a covered situs under the 1972 amendment to Section 3(a). Pet. App. 39a-40a.[2] The Board then concluded that benefits should be awarded. *Id.* at 44a.[3]

4. The court of appeals affirmed, with one judge dissenting. Pet. App. 2a-20a. The court characterized the issue before it as "whether the expanded situs requirement provided after the 1972 amendments applies to employees and their survivors if the employee was exposed before the effective date of the amendments, but was disabled or died after [that date]." *Id.* at 8a-9a. Because the coverage provision of the Act is triggered by an injury

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[2] Accordingly, the Board found no need to decide whether Peterson would have been covered under the pre-1972 version of the Act by virtue of his work on submarines. Pet. App. 41a n.6.

[3] In so doing, the Board reversed the ALJ's finding regarding causation, concluding that the ALJ had improperly placed the burden of proving a relationship between the injury and employment on the claimant. Pet. App. 41a-44a.

causing disability or death, 33 U.S.C. 903(a), the court believed that it had to "determine when Peterson was injured in order to determine which situs requirement to apply." Pet. App. 9a.

In making the date-of-injury determination, the court refused to defer to the position of the Director, Office of Workers' Compensation Programs, United States Department of Labor, that Peterson's injury occurred on the date he was last exposed to asbestos. The court explained that the Director's construction of Section 3(a) was "unreasonable." Pet. App. 9a.

Instead, the court of appeals held that Peterson's injury occurred at the time it manifested itself. Pet. App. 9a-12a. The court relied on a number of cases applying the manifestation rule under the LHWCA, and in particular on *SAIF Corp.*, *supra*, which gave three reasons for adopting that approach in determining coverage under the LHWCA's situs requirement: First, the manifestation rule "best comports" with the LHWCA's remedial purpose; second, "the date of manifestation most realistically defines when the injury occurs"; and third, the "trend in statutes and court decisions" favors application of the manifestation rule. Pet. App. 10a.

The court also relied on a series of cases applying another 1972 amendment in a manner that expanded the death benefits payable under the LHWCA when a worker who was injured before 1972 died after the effective date of the amendment. Pet. App. 12a-13a. Those cases held that the amendment was not being applied retroactively because it was being applied only to deaths occurring after 1972, even though the underlying injuries pre-dated the amendment. *Id.* at 13a. Accordingly, the court of appeals concluded that "the Director's contention that use of the date of manifestation results in retroactive application of the 1972 amendment is incorrect." *Ibid.*

District Judge Martin, sitting by designation, dissented. Pet. App. 14a-20a. Judge Martin disagreed with the majority's conclusion that its adoption of a manifestation rule did not result in a retroactive application of the 1972 amendment. *Id.* at 15a. In his view, "the majority creates a legal liability for Peterson's employer that did not exist at the time of his employment." *Ibid.* Furthermore, he deemed the majority's reasoning illogical because, if the majority was correct in concluding that Peterson's injury occurred in 1984 when the cancer manifested itself, then he was injured "in the hospital where the medical tests were administered, not 'upon the navigable waters' or any adjoining area under the control of General Dynamics." *Ibid.*

Judge Martin also criticized the majority's reliance on the reasoning of *SAIF Corp.* because that court "failed to consider the crucial distinction between applying a new rule retroactively to create an entirely new liability, and the retroactive application of a statute dealing only with procedures or remedies." Pet. App. 15a-16a. In particular, Judge Martin explained that the case principally relied on in *SAIF—Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984)—concerned "the extent of an existing liability," not the creation of a new substantive liability. Pet. App. 16a. Moreover, *Black* in turn relied primarily on cases involving "a procedural issue—the tolling of the statute of limitations—rather than a new substantive claim." *Ibid.*

Accordingly, Judge Martin concluded that the majority was in fact applying the 1972 amendment retroactively to impose a new substantive liability on petitioner. Pet. App. 18a-19a. In his view, such an approach was permissible only if Congress intended that result. *Id.* at 19a. Judge Martin found no evidence of such an intention, and concluded that the three factors outlined in

Bradley v. *Richmond School Bd.*, 416 U.S. 696 (1974), supported his view that the 1972 amendment was not retroactive, because retroactive application of the expanded situs requirement would work a "manifest injustice" upon employers not covered by the LHWCA before 1972. Pet. App. 19a-20a.

ARGUMENT

Although the Director, Office of Workers' Compensation Programs, disagrees with the court of appeals' conclusion that the 1972 LHWCA coverage amendments are applicable to pre-1972 employment events, review by this Court is not warranted. The court's interpretation of the LHWCA does not conflict with any decision of this Court or of any other court of appeals. Moreover, the practical impact of the decision appears to be quite limited, as only two cases raising this issue have reached the courts of appeals in the two decades since the 1972 amendments. Accordingly, the issue presented does not involve an important question of federal law that warrants resolution by this Court. In addition, even under the correct interpretation of the LHWCA the claimant was entitled to an award of benefits on the facts of record.

1. Until 1972, the LHWCA provided compensation only to employees who suffered "disability or death result[ing] from an injury occurring upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970); § 3(a), 44 Stat. 1426 (1927); see *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969). In 1972, Congress expanded the Act's coverage to encompass injuries on land adjacent to navigable waters, including injuries occurring on a "pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Pub. L. No. 92-

576, § 2(c), 86 Stat. 1251 (1972); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). Coverage was extended to avoid a "substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred," because state laws compensating land-based injuries typically provided lower benefit levels. H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10 (1972). The goal of the amendment was "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." *Id.* at 10-11.

The general effective date for the 1972 amendments to the LHWCA was 30 days after the date of enactment. Pub. L. No. 92-576, § 22, 86 Stat. 1265 (1972). In addition, both the House and Senate committee reports state that: "[t]he Committee intends that the extensions of coverage and the additional rights afforded to widowers will apply only to cases of deaths or injuries occurring on or after the effective date of these amendments." H.R. Rep. No. 1441, *supra*, at 13; S. Rep. No. 1125, 92d Cong., 2d Sess. 16 (1972). Thus, Congress clearly did not intend that amended Section 3(a) would extend coverage for injuries occurring prior to 1972.

It is equally clear that, for purposes of determining coverage under Section 3(a), an injury "occur[s]" at the time of the employee's exposure to harmful stimuli in the workplace, not when the occupational disease actually manifests itself at some later date. Section 3(a) authorizes compensation only "if the disability or death results from an injury occurring upon the navigable waters" or (since 1972) in adjoining areas. 33 U.S.C. 903(a). This statutory language establishes that the injury must occur on the covered situs, and not elsewhere, in order for the Act to apply. Accordingly, the court of appeals' holding that an injury does not occur until it manifests itself is irreconcilable with the statute's text,

because the manifestation of the injury will frequently occur at a place far removed from the covered situs. As the dissenting judge noted below (Pet. App. 15a), under the majority's manifestation rule the place of injury for purposes of Section 3(a) could just as easily be a hospital as a worksite; the statutory language forbids that result.

The 1984 amendments to the LHWCA provide further support for this interpretation of Section 3(a). The 1972 version of the LHWCA did not explicitly adopt a manifestation rule for any purpose. In contrast, the 1984 amendments expressly adopted a manifestation rule to define the "time of injury" for several purposes. Pub. L. No. 98-426, § 10(a)(2), 98 Stat. 1647 (1984), codified at 33 U.S.C. 910(i) (adopting manifestation rule to calculate average weekly wages); Pub. L. No. 98-426, §§ 11(a), 12, 98 Stat. 1648, 1649, codified at 33 U.S.C. 912(a) and 913(b)(2) (adopting manifestation or awareness rule to trigger notice and statute of limitations provisions); Pub. L. No. 98-426, § 28(c) and (g)(1), 98 Stat. 1655 (time of injury for determining applicability of 1984 coverage amendments is time of awareness of disease, not of disability).

Subsequent legislative history is at best an uncertain guide to the intent of a prior Congress (*Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)), but the 1984 committee reports make clear that Congress understood the time of "injury" under then-existing law to be something other than the time of manifestation of the disability, and amended several provisions of the Act precisely in order to change that result in specific contexts. Thus, with respect to Section 12 of the Act, the House Report commented that, "unlike traumatic occurrences, the period of time between the 'injury' and the arising of a compensation claim in * * * a long-latency occupational disease case may be so long as to make the requirement that the employee file a

Notice of Injury within thirty days of the 'injury,' nonsensical." H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 10 (1983). Likewise, with respect to Section 13 of the Act, "triggering the statute of limitations for the filing of compensation claims on the date of 'injury' makes little sense in the context of an occupational disease in which the disabling condition or the death does not follow immediately on the 'injury.'" H.R. Rep. No. 570, *supra*, at 11.

While certainly not conclusive in itself, this legislative history suggests that when Congress wanted to define the time of injury under the LHWCA as the date of manifestation of a disease or disability, it did so expressly. The 1972 amendments contain no hint that Congress intended to adopt a manifestation rule for coverage determinations. Thus, we believe that Congress meant the 1972 expansion of coverage to apply only to future employment events, whether traumatic accidents or injurious exposures, and not to pre-1972 exposures to hazardous substances that manifest themselves as occupational diseases in future years.[4] The reasoning of the Ninth Circuit in *SAIF Corp.* and of the court of appeals below is therefore erroneous.

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[4] This conclusion is not undermined in any way by this Court's recent decision in *Bath Iron Works Corp.* v. *Director, OWCP*, No. 91-871 (Jan. 12, 1993), slip op. 10-12. To be sure, the Court in that case did observe that "a worker who has been exposed to harmful levels of asbestos suffers no injury until the disease manifests itself years later." *Id.* at 10; see also *id.* at 12. That observation, however, was made in the context of the Court's analysis of new Section 10(i) of the Act, which expressly adopts a manifestation rule for determining the time of injury for purposes of calculating an employee's average weekly wage. 33 U.S.C. 910(i). Thus, that observation is of no relevance to the proper construction of Section 3(a), which contains no express manifestation rule and in fact indicates that the time of injury for coverage purposes is the time of the employee's exposure to the harmful stimuli.

2. Quite apart from the above statutory analysis, we agree with the dissenting judge below that because the majority "creates a legal liability for Peterson's employer that did not exist at the time of his employment" (Pet. App. 15a), it effectively mandates retroactive application of the 1972 coverage amendments. Under the Act, only a covered employer "shall be liable for and shall secure the payment to his employees of the compensation payable" under the LHWCA. 33 U.S.C. 904(a). A covered "employer" is defined as any employer "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States" or adjoining areas. 33 U.S.C. 902(4). An employer's duty to secure the payment of compensation may be fulfilled either by purchasing insurance or by obtaining permission from the Secretary of Labor to act as a self-insurer. 33 U.S.C. 932. In either case, the employer's liability under the LHWCA is based upon the existence of employees working in covered employment. If an employer had no covered employees under pre-1972 law, it had no legal duty and no reason to purchase or provide insurance to cover potential LHWCA liabilities.

This fact is significant because LHWCA insurance is not available to employers on a "retroactive" basis. Under the terms of any standard workers' compensation policy, coverage turns on whether the liability in question derives from employment during the policy period, not on the occurrence of disability or death within that period. See, *e.g.*, *Pennsylvania Nat'l Mut. Casualty Ins. Co.* v. *Spence*, 591 F.2d 985, 987 (4th Cir.), cert. denied, 444 U.S. 963 (1979); *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280, 1291-1292 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984). Accordingly, the decision below imposes on employers a new substantive liability that they had no way of anticipating or (in some instances) insuring against before the 1972 amendments.

"Retroactivity is not favored in the law." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Accordingly, "congressional enactments * * * will not be construed to have retroactive effect unless their language requires this result." *Ibid.* Nothing in the language of Section 3(a) as amended in 1972 requires that it be applied retroactively; to the contrary, as noted above (Point 1, *supra*), the legislative history of the 1972 amendment reflects Congress's intent that the extension of coverage under amended Section 3(a) should be applied prospectively only. The court of appeals therefore erred in applying amended Section 3(a) in this case.[5]

Construing the 1972 amendment to have exclusively prospective effect would avoid the logical absurdity of awarding benefits to a person who *never* worked in covered employment. The fundamental prerequisite for all workers' compensation statutes is that the compensable

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[5] In *Kaiser Alum. & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990), the Court noted that the general presumption against retroactivity was "[i]n apparent tension" with cases such as *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974), and *Thorpe* v. *Housing Auth.*, 393 U.S. 268 (1969), which appeared to announce a contrary rule. A concurring opinion in *Kaiser* set forth the reasons why *Bowen*, rather than *Bradley* and *Thorpe*, states the proper rule to be applied in judging whether congressional enactments should be given retroactive effect. See generally *Kaiser Alum.*, 494 U.S. at 840-858 (Scalia, J., concurring). Moreover, it is open to question whether *Bradley* and *Thorpe* would have any application in this case in any event; properly construed, those cases involve "a special rule applicable to changes in law after initial adjudication." *Id.* at 854. Section 3(a) was amended in 1972, long before the commencement of this proceeding, and thus the *Thorpe-Bradley* rule would seem inapplicable here on its own terms. Finally, as Judge Martin noted in dissent below (Pet. App. 19a-20a), the result would be the same in this case under either *Bowen* or *Bradley*, because retroactive application of Section 3(a) would upset the settled expectations of employers and insurers and thus would lead to "manifest injustice." *Bradley*, 416 U.S. at 717.

injury "aris[e] out of and in the course of employment." 33 U.S.C. 902(2); 1 A. Larson, *The Law of Workmen's Compensation* §§ 1.10, 6.00 (1992). Under the LHWCA, the injury must take place on a covered situs to be within the limited purview of the Act. But, on the facts as found by the ALJ, Peterson at no time worked on a covered situs: when he worked at the shipyard, it was not covered; and when it was covered, he did not work there. While there is presumably no constitutional impediment to extending coverage in such circumstances (see *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)), neither logic nor fairness commends such a result absent a plain statutory expression of congressional intent.

3. Although the Director disagrees with the analysis employed by the majority below, further review is not warranted. There is no conflict in the circuits; the decision is consistent with the only other appellate opinion addressing the precise issue presented here. Moreover, the issue of the retroactivity of the 1972 amendment to Section 3(a) has arisen only rarely. Unlike a traumatic injury, which necessarily occurs at a particular location that is either fully within or fully outside the scope of the Act, exposure to substances causing occupational diseases often occurs over a period of time in both covered and non-covered locations, as a longshoreman or shipyard worker moves back and forth in the course of his duties. Thus, even under the pre-1972 Act, most claimants with occupational diseases could introduce evidence of some exposure to injurious stimuli "upon the navigable waters," which would suffice for coverage purposes and would obviate any need to argue that the 1972 amendments were retroactive.

Indeed, for that very reason the Director does not disagree with the result reached by the court of appeals, even though the court's reasoning was flawed. The Director argued below that the record indicates that

Peterson was exposed to asbestos while aboard submarines. Accordingly, in the Director's view, Peterson satisfied the pre-1972 situs requirement, and an award of benefits was appropriate. For this additional reason, review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-730

In The

Supreme Court of the United States

October Term, 1992

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS;
Freelove Peterson (Widow),
Paul Peterson (Decedent),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is:

Whether the court of appeals correctly affirmed the decision of the Benefits Review Board which held that section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), as amended in 1972, applies to a 1985 injury.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were: the petitioner, Insurance Company of North America; the respondent, U.S. Department of Labor, Office of Workers' Compensation Programs; and the claimant-respondents, Paul Peterson (decedent) and Freelove Peterson (widow).

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No. 92-730

In the

Supreme Court of the United States

OCTOBER TERM, 1992

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
OFFICE OF WORKERS' COMPENSATION
PROGRAMS;
FREELOVE PETERSON, (WIDOW);
PAUL PETERSON, (DECEDENT),
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION

The Claimant-Respondents, Freelove Peterson (widow) and Paul Peterson (decedent) file this Brief in

Opposition to the Petition for a Writ of Certiorari filed by the Insurance Company of North America ("INA").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 969 F.2d 1400 and is reproduced in the Appendix to the Petition at 27a. The opinion of the Benefits Review Board is reported at 25 BRBS 71 (1991) and is reproduced in the Appendix to the Petition at 15a. The opinion of Administrative Law Judge Martin J. Dolan is reproduced in the Appendix to the Petition at 5a.

COUNTERSTATEMENT OF THE CASE

The underlying dispute between the parties concerns a claim for benefits made on behalf of the claimant-respondents pursuant to the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. sections 901 *et seq*. The claim arises out of Paul Peterson's employment in submarine construction with the Electric Boat Division of the General Dynamics Corporation on the Thames River in Groton, Connecticut

between November, 1962 and January, 1967. While employed at Electric Boat, Peterson worked as a carpenter primarily in the model and joiner shops located adjacent to the navigable waters of the Thames River. In the model shop, Peterson was responsible for building scaled down models of specific components on the submarines. In the joiner shop, he built battery wedges for the submarines' batteries and countertops. In addition to his work in the shops, Peterson also worked on board the submarines located in the navigable waters of the Thames River, taking measurements of the boats' components for the purpose of constructing the models to conform to changes in the boats' design.

During the years that Peterson worked at Electric Boat, asbestos was used extensively in the construction of submarines, both in the shops shoreside and on the boats. In both the model and joiner shops, Peterson often assisted the laggers and pipefitters by cutting pallets of asbestos sheets. On board the submarines, the pipecoverers installed asbestos insulation on the piping. In addition,

welders and burners used asbestos products to protect major components. While on board the submarines, the model makers (such as Peterson) worked among the other tradesmen and as a result, could not avoid breathing in asbestos dust.

Peterson was diagnosed as having lung cancer in 1984 and died almost a month later. The family physician subsequently raised the question of whether asbestos exposure at Electric Boat contributed to the cause of the cancer. The link between the decedent's asbestos exposure and his lung cancer was confirmed in 1985 by Dr. David Kerns, Assistant Professor of Medicine at Brown University School of Medicine in Providence, R.I.

Mrs. Peterson timely filed a claim for disability benefits on behalf of her husband and a claim for death benefits as his surviving widow pursuant to 33 U.S.C. sec. 903(a). After a hearing, the Administrative Law Judge applied the LHWCA as it existed when Mr. Peterson was last exposed to asbestos in 1967 and denied the claims, finding that there was no "direct evidence" that the

decedent went on board submarines or was exposed to asbestos on a covered situs.[1]

In their appeal to the Benefits Review Board, the claimants argued that the jurisdictional requirements of section 3(a) as it existed in 1967 had been met as the record was replete with uncontradicted evidence that Peterson had been exposed to asbestos while workng aboard submarines upon navigable waters. The claimants also argued that the Administrative Law Judge's requirement of "direct evidence" to establish jurisdiction was a novel standard not required in Longshore cases.

In a rare *en banc* decision, the Benefits Review Board reversed the Administrative Law Judge's decision.

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[1]The Longshore Act as it existed in 1967 only applied to injuries occurring upon the navigable waters of the United States. *See Crowell v. Benson*, 285 U.S. 22 (1932). Prior to the 1972 amendments, the jurisdictional provision of the LHWCA read as follows:

> Compensation shall be payable under this Chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . .

33 U.S.C. sec. 903(a); 44 Stat. 1426 (1927).

The Board held that the applicable law as to situs is the law in effect on the date of injury. In an occupational disease case, the date of injury is the date on which the disease manifests itself, not the date of last exposure to the injurious stimuli. Therefore, the Act as amended in 1972 applied because the decedent's lung cancer did not manifest itself until 1984.[2] As Peterson met the definition of employee under the amended Act, 33 U.S.C. sec. 902(3), and was injured as a result of work done on a situs covered under 33 U.S.C. sec. 903(a) as amended, the Benefits Review Board awarded death benefits to Mrs. Peterson

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[2]In the 1972 amendments, Congress expanded the coverage of the LHWCA to include injuries occurring in shoreside areas as long as the status requirement of section 2(3) is met as well. Section 3(a), as amended in 1972, reads as follows:

> [C]ompensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel*).

33 U.S.C.S. sec. 903(a) (Law. Co-op. 1980 & Supp. 1991) (emphasis added).

and remanded the case to the Administrative Law Judge for calculation of disability benefits.[3]

INA and the Director of the United States Department of Labor's Office of Workers' Compensation Programs appealed the Board's decision to the United States Court of Appeals for the Second Circuit. A majority of the three-judge panel (Miner and McLaughlin, J.J.) denied INA's petition for review, holding that the Board correctly applied the law in effect on the date the disease manifested itself rather than the law in effect on the date of last exposure to the injurious stimuli.[4]

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[3]The petitioner does not dispute that the model and joiner shops fall within the definition, found in section 3(a) as amended, of "other adjoining area customarily used by an employee in . . . building a vessel".

[4]The claimant-respondents below argued that the Administrative Law Judge erred in denying jurisdiction under the Act as of 1967 when Peterson was employed. In holding that the LHWCA as amended in 1972 applied, neither the Board nor the Court of Appeals addressed the issue of whether the Administrative Law Judge's conclusion that the claimants failed to satisfy the jurisdictional requirements of the pre-1972 Act was supported by substantial evidence.

REASONS FOR DENYING CERTIORARI

This Court has previously stated that it will not grant the writ of certiorari

> except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). When this standard is applied to the instant case, it is clear that the petition should be denied because the decision of the court of appeals below is correct, does not conflict with the holdings of this Court or any other court of appeals, and does not present an important question for resolution by this Court.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

Every other court that has addressed the issue of which law is applicable in an occupational disease case brought under the LHWCA has ruled that the law in effect on the date the disease manifests itself rather than the law

in effect on the date of last exposure to the injurious stimulus governs the claim. *See SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990); *Castorina v. Lykes Bros. S.S. Co.,* 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985); *Newport News Shipbuilding and Dry Dock Co. v. Harris*, 934 F.2d 548 (4th Cir. 1990); *Railco Multi-Construction Co v. Gardner*, 902 F.2d 71 (D.C. Cir. 1990). Accordingly, there is no split among the circuits that would justify granting the petition for certiorari.

II. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

The decision of the court of appeals involves the application of accepted legal principles to the facts and circumstances of this case. As INA admits in its petition,

> [t]his case involves private parties only. Mrs. Peterson is not acting in a role of a "private attorney general." She is pursuing private litigation under the LHWCA for her own benefit.

Petition for Certiorari, p. 9 (citations omitted).

As this Court "does [not] sit for the benefit of the particular litigants", *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), and as this case does

not require the resolution of principles of great importance to the public, *Layne & Bowler Corp., supra*, the petition for certiorari should be denied.

III. THE DECISION BELOW WAS CORRECT ON THE MERITS

The petitioner argues that applying section 3(a) of the Longshore Act as amended in 1972 to the facts of this case constitutes an impermissible retroactive application of law. In fact, applying the Act as amended in 1972 is a present application of law in effect on the date of injury.

It is well-established that the applicable law in both workers' compensation and third-party claims brought under the Longshore Act is that which is in effect on the date of injury. *Castorina*, 758 F.2d at 1029. In amending the LHWCA in 1972, Congress did not define when an injury occurs in an occupational disease case for the purposes of section 3(a), leaving it to the Benefits Review Board and the courts to flesh out the issue.

Prior to the 1972 amendments, case law had established that the date of injury in an occupational disease case is the date the disease manifests itself. *See*

Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). This interpretation was consistent with this Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949), which held that in an action based on occupational disease brought under the Federal Employers' Liability Act, 45 U.S.C. sec. 51 *et seq.*, the statute of limitations begins to run when the disease manifests itself:

> "[N]o specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves * * *."

Id. at 170 (quoting with approval *Associated Indemnity Corp. v. State Industrial Accident Commission*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)).

Congress amended section 13(a) of the Longshore Act in 1972 to incorporate this definition by also specifying the date of manifestation as the date when the statute of

limitations begins to run for filing a claim.[5] The Benefits Review Board consistently applied this interpretation until 1981. *See, e.g., Stark v. Bethlehem Steel Corp.*, 6 BRBS 600, 602-03 (1977), *reaff'd on reconsideration*, 10 BRBS 350 (1979); *Ward v. General Dynamics Corp.*, 9 BRBS 569, 571 (1978); *Keeler v. General Dynamics Corp.*, 7 BRBS 989, 991-92 (1978). In 1981, a divided Board reversed itself and held that the date of last exposure to the injurious substance should be the date of injury for the purpose of determining the average weekly wage under section 10 of the Longshore Act. *See Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981).

The last date of exposure approach (now urged by the Petitioner) was rejected by the Ninth Circuit for computing the average weekly wage in *Todd Shipyards*

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[5]Section 13(a) was amended in pertinent part to read as follows:

> The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C.S. sec. 913(a)(Law. Co-op. 1980).

Corp. v. Black, 717 F.2d 1280 (9th Cir.), *cert. denied*, 466 U.S. 937 (1984). The Ninth Circuit found *Dunn* to be "both ill-considered and contrary to the express purposes of the LHWCA," and held that for purposes of calculating the average weekly wage, an injury occurs in an occupational disease case when the disease manifests itself. *Black*, 717 F.2d at 1289. Congress quickly codified the Ninth Circuit's decision in *Black* by amending sections 10 and 12(a) in 1984.[6] In so amending these sections, Congress acknowledged that "[t]he first change to the body which results from exposure to a harmful physical agent or a toxic substance often is not disabling . . . [and] it is the disability which should trigger the compensation claim . . . ." H.R.

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[6]Section 10(i) now reads:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or the claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. sec. 910(i) (Law. Co-op. 1980 & Supp. 1991).

Rep. No. 98-570, Part 1, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2743.[7]

Since *Black*, four circuits in addition to the court below have held that the date of injury is the date of manifestation of the disease for the purpose of determining the applicable law in an occupational disease case.[8] In *Castorina*, the plaintiff longshoreman was last exposed to asbestos in May, 1972 (before the effective date of the amendments) and developed asbestosis in 1979. Pursuant to pre-1972 amendment law, Castorina brought an unseaworthiness claim against the defendant vessel owner under the general maritime law. The Fifth Circuit found section 905(b) as amended in 1972 to be applicable because the disease manifested itself after section 905(b)

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[7]*See also* House Conf. Rep. No. 98-1027, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2771, 2779-80.

[8]*See Newport News Shipbuilding and Dry Dock Co. v. Harris*, 934 F.2d 548 (4th Cir. 1990)(holding that the date of injury definition of section 10(i) was applicable for the purpose of determining entitlement to section 8(f) relief); *Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71 (D.C. Cir. 1990)(holding that the law in effect at the time of manifestation governs the jurisdictional issue); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990); *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985).

came into effect. *Castorina*, 758 F.2d at 1031. As a result, it upheld the dismissal of the unseaworthiness claim because section 905(b) in 1979 precluded an action for unseaworthiness by longshoremen. As the court reasoned:

> a worker who is exposed to asbestos or similar fibers does not always contract pulmonary disease. The date of injury, therefore, is most realistically defined as the date that the disease actually manifests itself.

Id.

In a case with facts nearly identical to those in the instant proceedings, the Ninth Circuit recently held that section 3(a) as amended in 1972 applied to a compensation claim based on asbestosis that manifested itself after 1972 when the last exposure to asbestos occurred prior to the 1972 amendments. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990). The claimant in that case had worked as a brick mason helper for Oregon Ship from 1941 to 1942 in the construction of new ships in a building way on land near the Willamette River. His job did not require him to work on navigable waters. While working ashore, he was exposed to asbestos. In 1980, Johnson

became disabled from asbestosis. *Id.* at 1435-36. The Ninth Circuit held that the jurisdictional requirements of section 3(a) as amended in 1972 applied because the injury occurred when the disease's manifestation disabled the claimant in 1980, not on the last day of exposure to asbestos in 1942. *Id.* at 1440.

In so holding, the *SAIF* court relied on three factors. First, the court emphasized that failure to apply this interpretation to the date of injury would mean that claimants exposed to injurious substances shoreside prior to 1972 would remain entirely uncompensated for their work-related diseases which develop later. This would directly contravene the remedial purpose of the Longshore Act, which "'is to compensate workers for the loss of wage-earning capacity resulting from occupational injuries and diseases.'" *Black*, 717 F.2d at 1289, quoted in *SAIF Corp.*, 908 F.2d at 1439. This view is supported by the legislative history of section 3(a) as amended in 1972:

> The present Act . . . covers only injuries which occur "upon the navigable waters of the United States." . . . The result is a disparity in benefits payable for death or

> disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate . . .
>
> * * *
>
> The Committee believes that the compensation payable to the longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4707-08.

Second, the *SAIF* court noted that while the process of asbestosis may begin upon exposure, most people would not consider themselves to be injured until they become symptomatic. *Id.* at 1439. Similarly, the Second Circuit has recognized that the Longshore Act "is not concerned with pathology, but with industrial disability; and a disease is no disease until it manifests itself." *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 466 (2d Cir.), *cert. denied*, 308 U.S. 570 (1939).

Finally, the Ninth Circuit in *SAIF* reiterated the view expressed in *Black* that the trend has been to apply

the date of manifestation in a variety of actions involving occupational diseases with long latency periods. *SAIF Corp.*, 908 F.2d at 1439 (citing cases).[9] The court took the position that the codification of the date of manifestation approach in sections 10, 12, and 13 of the Longshore Act established that trend even further. *Id.* In the proceedings below, the Benefits Review Board found the reasoning in *SAIF Corp.* to be so compelling, it sat *en banc* and adopted the Ninth Circuit's decision for all circuits.

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[9] In holding that the Nevada Occupational Disease Act as amended in 1967 provided the exclusive remedy to a claim brought under the Federal Tort Claims Act as a result of multiple myeloma from exposure to radiation between 1951 and 1963, the Nevada district court reasoned that the law in effect at the time of disability governs the claim because that is when the claimant's rights vest and the cause of action accrues. *Prescott v. United States*, 523 F. Supp. 918, 926 (D. Nev. 1981), *aff'd*, 731 F.2d 1388 (9th Cir. 1984). The court noted that this approach has been followed for occupational disease claims brought under other acts as well, such as the Colorado Occupational Disease Act:

> [T]he law which governs the rights and liabilities of the parties is that in force at the time of the disability and death . . . and the application of the law then in effect does not involve a retroactive application of that law.

Tucker v. Claimants in Death of Gonzales, 546 P.2d 1271, 1275 (Colo. App. 1976), quoted with approval in *Prescott*, 523 F. Supp. at 927.

The concept of the date of injury is critical in four sections of the Act. In section 3(a), it establishes when a claim arises under the Act. In section 10(i), it is a crucial element in calculating the claimant's compensation rate. Sections 12(a) and 13(a) use the date of injury to trigger the notice and filing requirements. As the Board noted in *Dunn*, *supra*, the general rule of statutory construction is that the same terms in the same statute are subject to the same interpretation unless there is reason to conclude that Congress intended otherwise:

> [T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) (citations omitted), quoted in *Dunn*, 13 BRBS at 655. The Board in *Dunn* nevertheless attempted to find such variation to justify its holding:

> We conclude that there is such a "variation in the connection" of the ways in which "injury" and especially "time of injury" are used in the Act that application of a single definition of "time of injury" would denigrate the purpose behind some of the provisions of the Act. . . . The various sections [of the Act] were obviously intended by Congress to implement the various concepts of worker's compensation which must be applied to each case. It is clear, for example, that the considerations which led to the adoption of the "manifestation" rule in Section 13(a) cases are not applicable to Section 10.

Dunn, 13 BRBS at 655 (footnote omitted).

Congress's response to *Dunn* dispelled any such interpretation. In amending section 10 to incorporate the date of manifestation approach, Congress sought "to insure that [occupational] disease victims receive compensation benefits which are adequate to their current needs." H.R. Rep. 98-570, 1984 U.S. Code Cong. & Ad. News at 2743. The Committee noted that the date of injury has little applicability to occupational diseases unless the date of manifestation is used. Otherwise, the statute of limitations would run out years, or frequently decades, before a worker even realized he had a work-related disease. Similarly,

only by applying the date of manifestation in determining the loss of wage earning capacity could the compensation benefits "be in an amount which is reasonable to the needs of the victim." *Id.* at 2745. Unless the date of manifestation is used in section 3(a), workers such as Peterson would remain inadequately compensated for their work-related diseases when Congress specifically intended to remedy this problem by amending section 3(a) in 1972. The legislative histories of the 1972 and 1984 amendments make it clear that the will of Congress can only be carried out if the time of injury is given the same meaning -- the date of manifestation -- throughtout the Act.

In reaching its decision that the date of injury is the date of manifestation, the court below found the Ninth Circuit's analysis to be persuasive and noted that it is consistent with the rule established by the Second Circuit prior to the 1972 amendments that the statute of limitations does not begin to run until the disease manifests itself. *See* majority opinion, p. 12, citing *Travelers Ins. Co. v.*

Cardillo, 225 F.2d 137, 142-43 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

Further, the court below reasoned that its ruling is consistent with the decisions applying the 1972 amendments to section 9 of the Act, 33 U.S.C. sec. 909, relating to death benefits. *See, e.g., State Ins. Fund v. Pesce*, 548 F.2d 1112 (2d Cir. 1977); *Puig v. Standard Dredging Corp.*, 599 F.2d 467 (1st Cir. 1979). In those cases, the employers had urged the same retroactivity argument maintained by INA in the instant proceedings.

Prior to the 1972 amendments, the Longshore Act provided for payment of death benefits to the surviving spouse and children only if the death was related to the compensable injury. As amended in 1972, section 9 made death benefits payable not only if the compensable injury caused death, but also when a permanently and totally disabled employee died of causes unrelated to his work injury.

In a case where the decedent became permanently and totally disabled due to a work-related injury in 1964

and died of unrelated causes in 1975, the employer argued that awarding death benefits to the surviving widow constituted an impermissible retroactive application of law in effect at the time of death and that the court should have applied the law in effect at the time of disability. *See Puig, supra.* The First Circuit rejected this argument and noted that the same argument had been rejected by courts awarding death benefits pursuant to the death benefits amendment of 1948. In addition, the court found unpersuasive the petitioners' argument that the 1972 amendment was different because it created a new and different class of beneficiaries:

> While the insurance carriers cannot be faulted for lack of persistence, their arguments have been and continue to be unpersuasive.
>
> Since we adopt the reasoning of our sister circuits that the amendment is not retroactive, petitioners' argument as to congressional intent is irrelevant.
>
> * * *
>
> [B]ecause the right to death benefits under the Act arises only upon death, and is separate from the right to disability benefits which arises when the employment injury occurs, application of the 1972 section 909 amendment in a case where, as here, death

> occurred after the amendment's effective date is a prospective application.

Id. at 470.

As the court below recognized, in both situations, the applicable law is that which is in effect on the date the cause of action accrues:

> Under the terms of the Act itself, the cause of action does not arise until disability or death occurs. 33 U.S.C. sec. 903(a). Thus, there can be no justification for applying the law in effect at the moment of last exposure, because at that time, even if the situs requirement were met, Peterson was not entitled to invoke the Act or maintain a suit thereunder until his injury resulted in disability or death.

Majority opinion, pp. 13-14. As the date of injury in this case is the date of manifestation of the disease in 1984, applying section 3(a) as amended in 1972 is not a retroactive application of law but rather a present application of the law in effect on the date the cause of

action accrued.[10]

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[10]Assuming, *arguendo*, that applying section 3(a) as amended in 1972 is a retroactive application of law, such an application is clearly permissible given this Court's ruling in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Usery* dealt with the application of the Black Lung Benefits Act of 1972 to claims filed by former coal miners who stopped working in the mines prior to the effective date of the statute:

> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect -- although, as we have noted, the Act imposed no liability on operators until 1974. And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.
>
> * * *
>
> We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . .

Id. at 15-17 (footnotes omitted).

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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